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GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals of New York fundamentally misconstrued this Court's decisions in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and *Agostini v. Felton*, 521 U.S. 203 (1997), when it held that the creation of a public school district under a statute of general application employing neutral, legitimate educational criteria violates the Establishment Clause simply because the principal intended beneficiary of the statute is a municipality whose citizens are members of a single religious community.

LIST OF PARTIES

The parties to the proceeding below were:

Louis Grumet,
Caroline C. Shipley,

Plaintiffs-Respondents.

George Pataki, as Governor of the State of New York,
The New York State Education Department,
Richard P. Mills, as Commissioner of the New York State Education Department,
The New York State Board of Regents,
H. Carl McCall, as New York State Comptroller,
The Board of Education of the Kiryas Joel Union Free School District,
The Board of Education of the Monroe-Woodbury Central School District,
Dr. William J. Bassett, Jr., as District Superintendent of the Orange-Ulster BOCES,

Defendants-Appellants.

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No. 98-____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

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LOUIS GRUMET and CAROLINE C. SHIPLEY,

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, various officials and departments of the State of New York as well as the Boards of Education of the Kiryas Joel Union Free School District and the Monroe-

Woodbury Central School District, respectfully request that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, entered on May 11, 1999.

OPINIONS BELOW

The majority and dissenting opinions of the New York Court of Appeals are not yet reported. They are reproduced at Pet. App. A, *infra*, pp. 1a-38a. The opinion of the Appellate Division, Third Department, of the Supreme Court of New York is reported at 244 A.D.2d 31, 675 N.Y.S.2d 662 (1998), and is reproduced at Pet. App. B, *infra*, pp. 39a-47a. The opinion of the Supreme Court for the County of Albany, New York, is unreported, and is reproduced at Pet. App. C, *infra*, pp. 48a-57a.

JURISDICTION

The decision of the New York Court of Appeals was issued on May 11, 1999. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

Section 1504 of New York's Education Law, added by Chapter 390 of the Laws of 1997, provides, in pertinent part:

> 3. Any municipality situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district may organize, pursuant to the provisions of this subdivision, a new union free school district consisting of the entire territory of such

municipality whenever required by the educational interests of the community.

a. No such new school district may be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; and (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality.

STATEMENT

This petition brings before this Court once more the Kiryas Joel Union Free School District, a public school district serving handicapped students in the Satmar Hasidic community of Kiryas Joel, New York. In 1994, a 6-3 majority of this Court held that the special legislation that originally created the Kiryas Joel School District was an unconstitutional establishment of religion because, the majority concluded, it singled out the Satmar religious community for special treatment rather than achieving the goal of accommodating the educational needs of the Satmar children through neutral, generally applicable statutory criteria. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994). Justices O'Connor and Kennedy, who provided the essential votes for the outcome, wrote separately to emphasize that a school district created for Kiryas Joel under a statute of general application employing neutral educational criteria would not be unconstitutional. *See id.* at 716-17 (O'Connor, J., concurring

in part and concurring in the judgment); *id.* at 728-30 (Kennedy, J., concurring in the judgment).

The New York legislature has now tried to do exactly what a fair reading of the opinions in *Kiryas Joel* would allow. It has passed a statute that permits any existing or future municipality to form its own school district provided only that the municipality satisfies a small number of legitimate criteria totally unrelated to religion. Kiryas Joel, which qualifies under the statutory criteria, has availed itself of this opportunity, and it has continued to operate its entirely appropriate, public educational program for students with special needs under the authority of this neutral statute of general application.

Despite the New York Legislature's attempt to conform the statute to the requirements of this Court's opinions in *Kiryas Joel*, a bare majority of the New York Court of Appeals has now held that the new law violates the Establishment Clause. Four judges of the court voted to strike down the statute even though they acknowledged that it is entirely neutral on its face, and that each of the criteria by which it determines whether a municipality may form its own school district advances legitimate, wholly secular educational concerns. Nonetheless, the court majority concluded that the law "has the primary effect of advancing one religion over others" because, in the majority's view, it disproportionately benefits the residents of Kiryas Joel and was intended to accommodate their interests. Pet. App. A, at 18a. Three judges of the Court of Appeals dissented vigorously. They said that the statute "does not have the effect of advancing religion," but "simply grants permission to any qualifying municipality to create its own public school district" based on "neutral secular criteria," with the ultimate end of providing assistance to "handicapped children in need of special, secular education." Pet. App. A, at 28a.

The majority of the New York court has seriously departed from applicable Establishment Clause principles and, in particular, from this Court's holdings in *Kiryas Joel* and in the Court's latest Establishment Clause decision, *Agostini v. Felton*, 521 U.S. 203 (1997). Indeed, the deviation from this Court's teachings is so great that summary reversal is warranted.

1. The Kiryas Joel School District Is Created

The events that led to this Court's *Kiryas Joel* decision are recited in detail in Justice Souter's opinion (*see* 512 U.S. at 690-96), and we summarize them briefly. Kiryas Joel is a village in Orange County, New York, all of whose residents are members of the Satmar Hasidic religious community, whom this Court described as "practitioners of a strict form of Judaism." *Id.* at 690. The village came into existence when the Satmars, who had settled in a subdivision of what was then the town of Monroe, took advantage of their right under New York's Village Law to form a new municipality. Because non-Satmars demanded that they not be included within the village's borders, the boundaries of the village were redrawn to coincide with those of the Satmars' property holdings.

Although a separate municipality, Kiryas Joel was still a part of the Monroe-Woodbury Central School District, a fact of limited significance to the majority of the Satmar children, who attend private religious schools. Those of the children who were handicapped, however, required and were entitled under state and federal law to receive special educational services from the public schools. When the Satmar children entered the Monroe-Woodbury public schools to receive those needed services, they experienced "panic, fear and trauma" (512 U.S. at 692) as a result of exposure to what they found to be a hostile school environment. Most Satmar parents felt compelled to withdraw their handicapped children from the public schools, and the special needs of the

children went unmet. Litigation in the New York state courts between the Satmar parents and the Monroe-Woodbury School District failed to resolve the problem. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 527 N.E.2d 767 (N.Y. 1988).

The New York Legislature responded to this serious problem in 1989 by enacting legislation constituting the village of Kiryas Joel as a separate school district. Kiryas Joel then created its own public school to provide special education and other education to its handicapped children. Handicapped children in neighboring school districts sought and received permission to attend Kiryas Joel's public school, and Orange County officials approved the public school's services for children throughout the county.

Two New York taxpayers who did not reside in Kiryas Joel or Monroe-Woodbury filed suit in the New York state courts, claiming that the creation of the school district violated both the Establishment Clause of the United States Constitution and the Blaine Amendment of New York's constitution. Expressly declining to reach the state constitutional issue, the New York Court of Appeals held by a 4-2 margin that the Kiryas Joel legislation violated the Establishment Clause because it was an "endorsement" of Satmar Hasidism that had the "primary effect" of "advanc[ing] religious beliefs." *Grumet v. Board of Educ. of the Kiryas Joel Village School Dist.*, 618 N.E.2d 94, 100 (N.Y. 1993). The court further ruled that the Legislature was forbidden to treat the Satmars as "entitled to special accommodation." *Id.* at 101.

2. This Court Decides *Kiryas Joel*

This Court affirmed in a 6-3 decision that produced six opinions. The lead opinion, written by Justice Souter, garnered a five-member majority for part of its analysis, but only a four-vote plurality for the remainder. The plurality

portion argued that New York had improperly conferred public authority on a religious community. The majority portion offered a narrower rationale, finding the "fundamental source of constitutional concern" presented by the case to be the legislature's granting of a special benefit to a single religious group, with "no assurance that the next similarly situated group seeking a school district of its own will receive one." 512 U.S. at 703. This departure from "neutrality as among religions" was, from the standpoint of the majority portion of Justice Souter's opinion, the decisive factor in the decision. *Id.* at 707. The opinion expressly differentiated the creation of the school district by special legislation (invalid) from the creation of the village itself pursuant to "the application of a neutral state law" (valid). *Id.* at 703, n.7.

By contrast to Justice Souter's opinion, Justice Scalia's dissent, which commanded three votes, found no constitutional flaw in the statute. To the dissenters, the New York Legislature was simply pursuing the legitimate secular purpose of providing educational opportunity to students with special needs through the creation and funding of a public school—a school that simply happened to have students who shared a common religion. 512 U.S. at 732-52 (Scalia, J., dissenting).

As between the diametrically opposed approaches of Justices Souter and Scalia, the balance was swung by Justice O'Connor, who formed the fifth vote for the majority portion of Justice Souter's opinion, and Justice Kennedy, who concurred in the judgment. Both Justices provided separate concurring opinions explaining their own reasoning in some detail. Both opinions stressed that the decisive factor was that the Kiryas Joel School District had not been created through the operation of a general statutory scheme that was neutral as among religious groups.

The critical passages in Justice O'Connor's concurrence read (512 U.S. at 716-17):

> On its face, this statute benefits one group—the residents of Kiryas Joel. Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification.
>
> * * *
>
> Our invalidation of this statute in no way means that the Satmars' needs cannot be accommodated. There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation. New York may, for instance, allow all villages to operate their own school districts. If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary. A district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group.

Justice Kennedy's concurrence similarly indicated that it was the "forbidden manner in which the New York Legislature sought to go about" the otherwise "valid" goal of "accommodat[ing] the special needs of the handicapped Satmar children" that led him to vote to strike down the initial Kiryas Joel legislation. 512 U.S. at 722-23 (Kennedy, J., concurring in the judgment). What made the legislature's method "forbidden," in Justice Kennedy's view, was that it "use[d] religion as a line-drawing criterion." *Id.* at 728. By contrast, if the school district had been "formed pursuant to a religion-neutral" statute (as the Village of Kiryas Joel was formed), the district's creation would not, in Justice

Kennedy's view, have offended the Establishment Clause. *Id.* at 729-30.

3. The Legislature's First Attempt to Remedy the Constitutional Flaw

Within four days of this Court's decision, the New York Legislature passed (and Governor Cuomo signed) a new statute that sought to comply with the teachings of the *Kiryas Joel* opinions by providing a general set of neutral criteria under which municipalities such as Kiryas Joel could form their own school districts. The legislation (Chapter 241 of the Laws of 1994) provided that a municipality located within the boundaries of an existing school district could form its own separate district if it met requirements designed to ensure that the new district would have enough students and resources to sustain it, and if it would not take away too many students or resources from the existing district. The legislation, however, contained two peculiar features: It provided that the carving out of a new school district could not leave the existing school district with a *richer* per-pupil tax base than it had before, and it further specified that only existing municipalities, as opposed to new ones that might be created in the future, could take advantage of its provisions.

Kiryas Joel reconstituted its school district under the terms of Chapter 241 and continued the operation of its public school. Once again, the taxpayer plaintiffs filed a constitutional challenge. The trial court, finding the underlying statute to be a neutral law of general application, rejected the constitutional challenge. Ultimately, however, the New York Court of Appeals, in a unanimous opinion, disagreed. *See Grumet v. Cuomo*, 681 N.E.2d 340 (N.Y. 1997).

All the judges of the New York Court of Appeals said that some of the criteria defining the circumstances under which a municipality could form its own school district were

neutral and served legitimate educational purposes (*id.* at 347 (citations omitted)):

> A review of the statutory criteria shows some of them to be related to legitimate educational concerns. For example, the requirement that the existing school district and the new school district both comprise at least 2,000 students will reasonably ensure "a sufficient student base" for both districts to sustain their operations. Similarly, the qualification that a municipality cannot form its own district if its secession will reduce the population of the preexisting district by more than 60% would seem a legitimate means of protecting the preexisting district by "limit[ing] the percentage of the [preexisting district's] territory that could be lost if a municipality creates its own school district."
>
> Chapter 241's fiscal criteria, for the most part, also serve identifiable purposes. Requiring that the new district possess an actual valuation per total wealth pupil unit at least equal to the State-wide average (calculated roughly by dividing the district's total property value by the number of students) "ensure[s] that a sufficient property base exists to support school district operations." Moreover, the proviso that the creation of the new school district not reduce the per pupil wealth of the preexisting district by more than 10% is an appropriate way to protect a preexisting district from the potentially impoverishing effect of a wealthy municipality's secession.

The court unanimously held, however, that two of the statutory criteria did not serve legitimate purposes: (1) the provision that the creation of a new district could not *increase* the per pupil wealth of the preexisting district by more than 10%, and (2) the restriction limiting the benefits of the statute to municipalities existing at the time the

legislation was passed. *Id.* at 347-48. The effect of these provisions, together with the other statutory criteria, was to make Kiryas Joel the only municipality that qualified under the statute, and to make it extremely unlikely that any other municipality would ever qualify. *Id.* As a result, all the judges of the court held, "chapter 241 violates the Establishment Clause by effectively singling out the Village of Kiryas Joel for special treatment and thereby demonstrating impermissible governmental endorsement of this religious community." *Id.* at 342. None of the three parties that appeared separately in the 1994 litigation in this Court and that are now filing this joint petition sought review by this Court of the New York court's 1997 decision.

4. The Legislature Tries Again

During the three months that followed the court's ruling, the New York Legislature again wrestled with the problem of meeting the educational needs of Kiryas Joel's children while avoiding the flaws identified by the full Court of Appeals in the 1994 legislation. The Legislature ultimately adopted a straightforward solution. It enacted a law that conditioned a municipality's ability to form its own school district on satisfaction of only those criteria that the New York court had found to be legitimate, and it dispensed with the other limiting criteria. The result was Chapter 390 of the Laws of 1997, which permits any municipality wholly within the boundaries of an existing school district to form its own school district, as long as both the new and the old school districts will be left with at least 2,000 children, the new district's student population is no more than 60% of that of the existing school district, and the new district's per pupil wealth is equal to the statewide average. As an indication that the legislation was not designed solely to apply to Kiryas Joel, Governor Pataki's memorandum approving and signing it declared, as many legislators had believed, that 10 of the state's municipalities (including Kiryas Joel) would be

immediately eligible to form school districts under the legislation.

After passage of Chapter 390 in August 1997, Kiryas Joel again reconstituted its school district under the terms of the new law and has now operated its public school under the authority of Chapter 390 for nearly two full years. The school currently serves some 220 handicapped students, including students placed in the school by neighboring districts—not all of whom are Hasidic or even Jewish. The school's professional staff is not selected on the basis of religious affiliation, and there has never been any evidence that its curriculum includes inappropriate religious instruction. At no time has there been any evidence, or any allegation, that the Kiryas Joel public school has provided anything other than a program of appropriate instruction for students with special educational needs.

5. Four Judges of the New York Court Reject the New Statute

The taxpayer plaintiffs promptly filed yet another Establishment Clause case in the New York state courts, this one aimed at Chapter 390. On May 11, 1999, in a 4-3 split decision, the New York Court of Appeals rejected the New York Legislature's latest effort.

The majority acknowledged that Chapter 390 "sets forth facially neutral criteria" (Pet. App. A, at 11a), and the majority's opinion did not contest that (as it had previously held) *all* of those criteria were directly related to legitimate educational purposes. Nonetheless, four judges concluded that Chapter 390 was "not a neutral law of general application" (Pet. App. A, at 13a), because, contrary to what the Legislature and the Governor thought when the statute was enacted and signed, only two municipalities (Kiryas Joel and the Town of Stony Point) are currently indisputably eligible to form school districts under the statute. Although

there was no limit to the number of municipalities that could qualify in the future,[1] the majority concluded that "the statute's qualifying criteria are consciously drawn to benefit Kiryas Joel" (Pet. App. A, at 12a), and that "Chapter 390 violates fundamental Establishment Clause neutrality principles, it has the primary effect of advancing one religion over others and constitutes an impermissible religious accommodation." Pet. App. A, at 18a.

Three dissenters, including two judges who had joined the court's unanimous opinion striking down Chapter 390's predecessor, concluded that the Legislature's elimination of the flaws that had been found in the previous law rendered Chapter 390 a genuinely neutral statute aimed at the legitimate secular purpose of "redress[ing] a modern educational conundrum encountered by the Village of Kiryas Joel with respect to some of its neediest citizens, its handicapped children." Pet. App. A, at 23a.

The dissenters also pointed out that this Court's decision in *Agostini v. Felton*, *supra*, which held that the constitutionality of a state program could not be dependent on the relative numbers of religious and nonreligious groups it benefits, was flatly inconsistent with the majority's analysis. *See* Pet. App. A, at 24a-26a. The dissenters further rejected the majority's suggestion that the Legislature's persistence in its efforts to solve the problems of Kiryas

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[1] The Board of Education of Kiryas Joel submitted affidavits attesting that ten municipalities would immediately be able to form school districts under the law if they incorporated, and that many other possible municipalities could qualify in the future. The New York courts rejected this evidence because they concluded that the future eligibility of municipalities was somehow irrelevant or speculative. In its decision invalidating the 1994 law, by contrast, the New York Court of Appeals had found the law unconstitutional in large part because it prevented *future* municipalities from qualifying. It was not then suggested that the eligibility of future municipalities was too "speculative" to be part of the constitutional equation.

Joel's handicapped children somehow tainted the latest legislative solution.

The dissenters observed that the majority's decision showed that "Establishment Clause jurisprudence remains particularly conflicted," and they predicted that the case presented "a potential fact pattern for a second review by the Supreme Court of the United States." Pet. App. A, at 37a.

REASONS FOR GRANTING THE WRIT

I.
THE HOLDING OF THE NEW YORK COURT OF APPEALS IS DIRECTLY AT ODDS WITH THIS COURT'S DECISION IN *KIRYAS JOEL* AND ITS ESTABLISHMENT CLAUSE JURISPRUDENCE

In 1994, this Court addressed important principles of accommodation under the Establishment Clause when it decided *Board of Education of Kiryas Joel Village School District v. Grumet, supra*. These principles were subverted by the decision below. In striking down Chapter 390, the Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c).

1. Permissible Accommodation of Religious Needs.— This Court in *Kiryas Joel* unanimously reaffirmed the principle that accommodation of religious needs or concerns is permissible, and sometimes necessary, under the Establishment Clause. Although it struck down the statute creating the Kiryas Joel School District as a non-neutral accommodation of religious preferences, this Court, in the portion of Justice Souter's opinion that Justice O'Connor joined and that thus constituted the majority opinion, clarified that the well-established principles of accommodation remained undisturbed. Citing a long line of this Court's Establishment Clause jurisprudence, the majority expressly noted that "the Constitution allows the State to accommodate

religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." 512 U.S. at 705. The majority went so far as to suggest some permissible means by which the Legislature could accommodate the Satmar religious community's concerns, including through "general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings." *Id.* at 708.

The concurring opinions of Justice O'Connor and Justice Kennedy, as well as the dissent of Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) went even further in recognizing the validity of legislative accommodation of religious preferences. Justice O'Connor expressly stated that "[t]here is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation." *Id.* at 717. She noted that New York could "set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary." *Id.* And she stressed that "[a] district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group." *Id.* Likewise, Justice Kennedy wrote separately because of his "reservations about what the Court's reasoning implies for religious accommodations in general." *Id.* at 722. He underscored "the legislature's ability to respond to the unique problems of a particular religious group." *Id.* The dissenting Justices found the statute to be a constitutional accommodation within this nation's long tradition of religious toleration. *Id.* at 732, 742-47.

The majority in the Court of Appeals ignored these principles of accommodation when it invalidated Chapter 390 as having the primary effect of advancing or preferring one religion over others. The majority concluded that because only two municipalities (one of which is not a religious community) currently qualify under the generally applicable scheme of Chapter 390 to form school districts, and because the statute was an extension of past attempts to accommodate the Satmar community in particular, "the secular effect of the statute is virtually indiscernible." Pet. App. A, at 20a. This view that a neutral statute must fail because it reflects a legislative intent to assist the Satmar community turns this Court's Establishment Clause jurisprudence upside down. The one point of agreement among the opinions in *Kiryas Joel* was that accommodating the educational needs of the handicapped Satmar children was a legitimate, secular purpose. *See* 512 U.S. at 705-07 (Souter, J.); *id.* at 715-17 (O'Connor, J., concurring); *id.* at 723 (Kennedy, J., concurring); *id.* at 738 (Scalia, J., dissenting). All the Justices accepted the principle that even a legislative attempt to accommodate a particular religious community can serve as a valid and permissible basis for neutral legislation. *See id.* at 708 (Souter, J., for the Court) ("Nor do we impugn the motives of the New York Legislature, ... which no doubt intended to accommodate the Satmar community without violating the Establishment Clause."); *id.* at 717 (O'Connor, J., concurring) ("There is nothing improper about a legislative intention to accommodate a religious group, so long as it is implemented through generally applicable legislation."); *id.* at 724 (Kennedy, J., concurring) ("New York's object in creating the Kiryas Joel Village School District—to accommodate the religious practices of the handicapped Satmar children—is validated...."); *id.* at 743 (Scalia, J., dissenting) ("But even if Chapter 748 were intended to create a special arrangement for the Satmars *because* of their religion..., it would be permissible accommodation.").

2. The "Neutral Criteria" and "Generally Applicable" Standards of the Concurring Opinions.—In fact, Chapter 390, which the majority below struck down, is precisely the type of permissible legislative accommodation contemplated by the Court in *Kiryas Joel*. The key guideposts for determining what *Kiryas Joel* held are the concurring opinions of Justices O'Connor and Kennedy. Where the votes of concurring Justices are essential to the outcome of a case, "'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)); *see also O'Dell v. Netherland*, 521 U.S. 151, 160 (1997).

The "narrowest grounds" for the *Kiryas Joel* result are those set forth in Justice O'Connor's and Justice Kennedy's opinions. Justice O'Connor's opinion, as noted above, states expressly that a state law "may set forth neutral criteria that a village must meet to have a school district of its own" and that "[a] district created under [such] a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its voters as an enclave for their religious group." 512 U.S. at 717 (emphasis added). Similarly, Justice Kennedy's opinion makes clear that a statute that does not "use religion as a line-drawing criterion," *id.* at 728, but instead allows religious as well as non-religious groups to form governmental bodies "pursuant to a religion-neutral" procedure (*id.* at 729) is constitutional.

Chapter 390 undoubtedly satisfies the standards set forth in these opinions. It does not, either on its face or in practice, limit the ability to form a school district to a religious community. Rather, it relies solely on what even the New York Court of Appeals has recognized as facially neutral, educationally relevant criteria to determine whether a municipality may form a school district. That a religious community has benefited by the statute, and, indeed, that the

statute may have been motivated by the desire to accommodate the educational needs of the children of that community, cannot, under the decisive opinions in *Kiryas Joel*, make the statute or the resulting school district unconstitutional.

Similarly, the statute avoids the constitutional vice identified in the original Kiryas Joel legislation by that portion of Justice Souter's opinion that Justice O'Connor joined and that thus constituted a majority opinion. Unlike the statute that this Court struck down, Chapter 390 provides the necessary "assurance that the next similarly situated group seeking a school district of its own will receive one." 512 U.S. at 703. If a group satisfies the religiously neutral criteria set forth by the statute (which were ratified by the unanimous Court of Appeals in 1997 as "related to legitimate educational concerns"), Chapter 390 gives that group the same right as Kiryas Joel to form its own school district. If a group is unable to satisfy those neutral, legitimate and non-exclusionary criteria, it cannot be called "similarly situated" in any legally relevant sense. Thus, Chapter 390 in no way singles out Kiryas Joel for a forbidden religious preference over other similarly situated groups.

3. Conflict with *Agostini v. Felton*.—The New York court's rejection of Chapter 390 also rests on premises irreconcilable with this Court's more recent decision in *Agostini v. Felton*, 521 U.S. 203 (1997). *First*, the majority's view that the statute has a "primary effect of advancing religion" simply because a community of religious believers benefits from the statute disregards *Agostini*'s central holding: A law does not have the "primary effect of advancing religion" merely because believers are advantaged by it. The *Agostini* opinion could hardly have been clearer on this point: "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." 521 U.S. at 229. *Second*, in *Agostini*,

the Court made clear that providing educational assistance to sectarian students is a legitimate government purpose, as long as "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." 521 U.S. at 231. That is precisely what Chapter 390 does.

Finally, the decision of the majority of the Court of Appeals adds an unprecedented and disturbing element to existing Establishment Clause jurisprudence that further restricts what would otherwise be permissible accommodation. The majority below held that since this Court decided *Agostini*, there were now other ways, short of the statute at issue, to solve the problems of educating the handicapped children of the Village of Kiryas Joel. In the majority's view, Chapter 390 was not necessary and, therefore, "would likely be perceived as a religious preference in light of the arguably constitutionally permissible alternative *Agostini* has provided." Pet. App. A, at 21a.

There is no precedent for imposing a least-restrictive-alternative test in assessing the means the legislature chooses to accommodate burdens on the exercise of religion. While the parties might conceivably opt to resume their former practice of sending public school employees into the religious schools to deliver secular services, the legislature is not constrained from accommodating their needs by means of a generally applicable law containing neutral criteria. Moreover, *Agostini permits*, but does not *require*, the pre-*Aguilar* practice. There is no assurance that the Monroe-Woodbury Central School District would be willing to provide at Kiryas Joel's religious schools the accommodation *Agostini* now permits. The existence of another possible avenue of relief that a local school district may wish not to pursue cannot transform a legitimate legislative choice into evidence of an impermissible preference. To impose this

unprecedented and novel requirement is not only an unwarranted and improper restriction on accommodation, but it would encourage the further intrusion of the judiciary into the realm of the legislature.

II.
THE ISSUE IS IMPORTANT

It is unusual, though far from unheard of, for this Court to address the same controversy twice. *See, e.g., Agostini v. Felton, supra*; *Aguilar v. Felton*, 473 U.S. 402 (1985); *United States v. Richman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). When a State has enacted a new law correcting constitutional flaws found by this Court in a statute, the Court has not hesitated to review and uphold the corrective legislation. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976) (approving constitutionality of death penalty legislation replacing that struck down in *Furman v. Georgia*, 408 U.S. 238 (1972)); *Planned Parenthood of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) (upholding a parental notice/judicial bypass abortion regulation replacing the parental notice provision struck down in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976)). The importance of the issues presented by this case places it in the company of cases that deserve further consideration by this Court, whether through summary disposition, as we suggest, or plenary review.

It is always a matter of importance when the United States Constitution is invoked to strike down and enjoin the operation of a presumptively constitutional statute duly enacted by the legislature of a State. Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of

irreparable injury." *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice, 1977).

Here, the importance of the matter is more than merely theoretical. The education of the handicapped children of Kiryas Joel is a problem that has challenged the New York Legislature for a decade. The Legislature's repeated efforts to come up with a creative and constitutional solution indicate the significance of the matter to the elected representatives of the people of New York, as well as to the community of Kiryas Joel and its immediate neighbors.

The issues presented have a broader importance as well. Establishment Clause cases, because of their significance in defining the nature of our government and its relationship with the people, have rightly commanded considerable attention from the Court in recent years. The importance of this particular controversy is reflected in the substantial commentary that this Court's decision in the *Kiryas Joel* case produced in legal and popular journals.[2] Moreover, the reasoning underlying the New York court's resolution of this latest phase of the controversy, if permitted to stand, could have substantial effects on future state and federal legislation and on similar issues affecting public schools in other States.

For example, a recent amendment to the Medicare and Medicaid Acts has set forth criteria under which "religious non-medical health care institutions" may participate in the Medicare and Medicaid programs. An earlier version of this legislation, which singled out "Christian Science sanitoria"

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[2] *See, e.g.*, Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996); Alison Wheeler, *Separatist Religious Groups and the Establishment Clause -- Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994)*, 30 HARV. CIV. RIGHTS & CIV. LIB. L. REV. 223 (1995); Thomas C. Berg, *Slouching Towards Secularism: A Comment on Kiryas Joel School District v. Grumet*, 44 EMORY L. J. 433 (1995); Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L. J. 1 (1995).

by name for special treatment, was held unconstitutional by a federal court under the Establishment Clause. *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996). But subsequent legislation, which set forth generic criteria governing such institutions, was upheld by the same court *even though Christian Science sanitoria were the only extant institutions that met those criteria. Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, Civ. No. 97-1794 (ADM/JGL) (D. Minn. July 24, 1998).[3] The court rejected the argument that the revised legislation singled out a particular religious group for disparate treatment, holding that "it may not be assumed that 'there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position.'" *Id.*, slip op. at 16 (quoting 938 F. Supp. at 1480). Of course, under the analysis adopted by the New York Court of Appeals, the federal legislation would be doomed.

Similarly, the analysis of the New York court's majority would necessitate a different outcome in *Stark v. Independent School Dist. No. 640*, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998). That case concerned a school that had been established in a small Minnesota community to accommodate the needs of a tiny sect called the Brethren. Although the establishment of the school and the modification of its instructional program to grant exemptions from the use of technology that offended the Brethren were based on neutral policies of the school district and the State, the school clearly benefited the Brethren. Indeed, all the school's students were members of the Brethren. Even so, the Eighth Circuit held that the establishment and operation of the school did *not* have the primary effect of advancing religion. *Id.* at 1073-75. Because the neutral policies underlying the school's creation did not specifically single

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[3] Copies of the district court's unreported decision have been lodged with the Clerk.

out the Brethren for special treatment, the Eighth Circuit ruled that the school was a permissible accommodation. *Id.* at 1075-76. Under the reasoning of the New York court's majority, by contrast, the disproportionate benefit flowing to the Brethren would have condemned the school to constitutional oblivion.

Finally, there are important institutional interests for this Court. This matter was significant enough for this Court to take up once. No fewer than six of the members of this Court issued written opinions. The case, accordingly, is important enough to justify making sure that the guidance given by the Court is followed, rather than evaded or ignored. By the same token, if the opinions issued by this Court are to be given an interpretation other than that which follows naturally from their plain words, it should be this Court, not the New York court, that so decides.

III.
SUMMARY REVERSAL IS APPROPRIATE

The decision rendered by the four-judge majority of the New York Court of Appeals so far departs from the clear teachings of this Court's two most relevant and recent decisions (*Kiryas Joel* and *Agostini*) that correction of the error is warranted. Indeed, the majority's disregard for this Court's opinions merits summary reversal. *See, e.g., Stewart v. LaGrand*, 119 S. Ct. 1018 (1999); *Pounders v. Watson*, 521 U.S. 982 (1997); *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Mireles v. Waco*, 502 U.S. 9 (1991); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988). As this Court has recognized, "summarily set[ting] aside unsupportable judgments" is particularly "appropriate when what is at issue is the total invalidation of a statewide law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). This is no less true when a state court has erroneously invalidated a state law on federal grounds than when a federal court has done so. *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The decision of the New York Court of Appeals may be summarily reversed.

Respectfully submitted,

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APPENDIX A

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Louis GRUMET et al., Respondents,
v.
George PATAKI, as Governor of the State of New York, et al., Appellants.

Court of Appeals of New York.

May 11, 1999.

Peter H. Schiff, for State appellants.

Nathan Lewin, for appellant BOE Kiryas Joel.

Lawrence W. Reich, for appellant BOE Monroe-Woodbury.

Jay Worona, for respondents.

The Becket Fund for Religious Liberty; and American Jewish Congress, *amici curiae*.

SMITH, J.:

At issue on this appeal is whether Chapter 390 of the Laws of 1997, which enables Kiryas Joel to create a separate school district for its disabled children, violates the Establishment Clause of the First Amendment of the United States Constitution. We conclude that the legislation has the impermissible effect of advancing one religious sect and that it is unconstitutional.

I.

The long history underlying this action is fully chronicled in previous opinions by the Supreme Court of the United States and this Court (*see, Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546; *Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340; *Grumet v. Board of Educ. of Kiryas Joel Vil. School Dist.*, 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94, *affd* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546; *Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889, 527 N.E.2d 767). Kiryas Joel is a village comprised of Satmar Hasidic Jews residing in Orange County, New York. Residents of Kiryas Joel are devoutly religious and, among other things, follow a strict interpretation of the Torah, segregate the sexes outside the home and dress in a distinctive manner. The children of the Village are educated in parochial schools--boys at the United Talmudic Academy, where they are taught the Torah and girls at Bais Rochel, where they are instructed and prepared for their roles as wives and mothers. Neither school, however, provides special educational services to handicapped children who, under State and Federal law, are entitled to such services even when enrolled in private schools (Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*).

Prior to 1985, the handicapped children of Kiryas Joel, located within the Monroe-Woodbury Central School District, received special educational services provided by Monroe-Woodbury in a building annexed to Bais Rochel. In 1985, following the decision of the Supreme Court in *Aguilar v. Felton* (473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290) and *Grand Rapids School Dist. v. Ball* (473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267)--which ruled that publicly funded classes on religious school premises violated the Establishment Clause-- Monroe-Woodbury ceased offering

on-site schooling to Kiryas Joel's handicapped children. That decision, now overruled by the Supreme Court, triggered the years of litigation preceding this appeal.

After several months of sending their handicapped children to public schools to receive the special education services, the parents of Kiryas Joel refused to continue the arrangement, alleging that the children experienced fear and trauma in leaving their community and interacting with people whose ways were so different from theirs (*Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 181, 531 N.Y.S.2d 889, 527 N.E.2d 767, *supra*). Many sought administrative review of Monroe-Woodbury's decision to offer the special education services only in public schools. Monroe-Woodbury commenced a declaratory judgment action, seeking a declaration that Education Law § 3602-c compelled it to furnish special education services only in regular classes and programs of the public schools, and not elsewhere. This Court ruled that the law neither compelled Monroe-Woodbury to provide special education to Kiryas Joel's handicapped children in public schools, nor required it to do so in a segregated setting, as was urged by Kiryas Joel (*id.*, at 188, 531 N.Y.S.2d 889, 527 N.E.2d 767). Instead, this Court ruled that Monroe-Woodbury provide the special services at a site reasonably accessible to Kiryas Joel's handicapped children (*id.*, at 184, 531 N.Y.S.2d 889, 527 N.E.2d 767).

A. KIRYAS JOEL I

In an effort to resolve the longstanding controversy between Kiryas Joel and Monroe-Woodbury, the Legislature enacted Chapter 748 of the Laws of 1989,[1] which established a

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[1] Education Law § 1504(3), as added by former L.1989, ch. 748 provided:

union free school district coterminous with Kiryas Joel within the boundaries of Monroe-Woodbury. In *Grumet v. Board of Educ. of Kiryas Joel Vil. School Dist.*, (81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94, *supra*), this Court held that Chapter 748 contravened the Establishment Clause of the First Amendment of the Federal Constitution because it violated the second prong of the three-part test delineated in *Lemon v. Kurtzman* (403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745). The Court reasoned that because the newly formed school district was coterminous with Kiryas Joel, only Hasidic children would attend the public school, and only members of the Hasidic sect would likely serve on the school board. The Court concluded that the statute therefore constituted a "symbolic union of church and State effected by the establishment of the Kiryas Joel Village School District * * * [and was] likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval of their individual religious choices" (*Grumet v. Board of Educ.*, 81 N.Y.2d, *supra*, at 529, *citing Grand Rapids School Dist. v. Ball* 473 US, *supra*, at 390).

The Supreme Court affirmed this Court's holding in *Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet* (512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 [*Kiryas Joel I*]). In a

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"Section 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange County, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law."

6-3 decision, the Supreme Court ruled that Chapter 748 violated the prohibition against government establishment of religion because the act was "tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality towards religion" (512 US, at 690). The Court stated that the statute departed from a constitutional requirement of neutrality toward religion by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurances that governmental power has been or will be exercised neutrally" (*id.*, at 696; *see also, id.*, at 703). The legislative act, in the words of the Supreme Court, left "the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion" (*id.*, at 703).

B. KIRYAS JOEL II

Eleven days after the Supreme Court's decision in *Kiryas Joel I*, the Legislature responded by passing Chapter 241 of the Laws of 1994. Under the new statute, a municipality located wholly within a single central or union free school district but whose boundaries were not coterminous with the boundaries of any preexisting school district could establish its own school district whenever the educational interests of the community required it (*Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340 [hereinafter, *Kiryas Joel II*], *citing* former Education Law § 1504[3][a]).[2] The statute set

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[2] Former Education Law § 1504(3)(a), as added by L.1994, ch. 241 stated:

> (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from

forth facially neutral criteria that a municipality could satisfy in order to establish a school district and delineated the process by which the new school district could be formed. The statute further defined the term "municipality" as "a city, town or village in existence as of the effective date of this subdivision" (*id.*).

This Court held Chapter 241 of the Laws of 1994 unconstitutional for two reasons (*Grumet v. Cuomo*, *supra*). First, this Court determined that although the statute was facially neutral, it had a nonneutral effect of allowing Kiryas Joel to create its own school district without providing the same opportunity to other groups. Specifically, the Court reasoned that by limiting its applicability to municipalities "in existence as of the effective date of" the statute, any group, religious or nonreligious, subsequently incorporated as a municipality was effectively cut off from utilizing Chapter 241's procedures (*id.*, at 72, 659 N.Y.S.2d 173, 681 N.E.2d 340). The definitional limitation manifested itself in such a way that only one sect reaped the benefits of the statute--Kiryas Joel. The Court noted that the Legislature might have achieved a constitutionally acceptable result if it had enacted a law of "general applicability that the Village of Kiryas Joel, as one in a broad array of eligible municipalities, might have invoked" (*id.*, at 75, 659 N.Y.S.2d 173, 681 N.E.2d 340 [emphasis added]).

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which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality; and (iv) the actual valuation per total wealth pupil unit of such existing school district will not increase or decrease by more than ten percent following the organization of the new school district by such municipality."

Second, the Court determined that Chapter 241, like its predecessor, failed the second prong of the *Lemon* test (*id.*, at 68). The Court stated that, inasmuch as Kiryas Joel was the only municipality eligible to benefit from the statute, "the enactment of Chapter 241 would be perceived as an act of governmental favor for the sole benefit of the Satmar sect" (*id.*, at 76).

C. THE STATUTE UNDER REVIEW

Three months after the Court's determination in *Kiryas Joel II* that Chapter 241 was unconstitutional, the Legislature enacted a third statute--Chapter 390 of the Laws of 1997, or "The Kiryas Joel School Bill"--which is before us on this appeal (Education Law § 1504, added by L 1997, ch 390). Education Law § 1504[3] delineates criteria which a municipality, "situated wholly within one central or union free school district but whose boundaries are not coterminous with

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[3] Education Law § 1504(3), as added by L.1997, ch. 390, states in full:

> "3. Any municipality situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district may organize, pursuant to the provision of the subdivision, a new union free school district consisting of the entire territory of such municipality whenever required by the educational interest of the community.
>
> "a. No such new school district may be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; and (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality."

the boundaries of such school district," may follow in order to establish its own school district. The statute prescribes that (i) the new school district equal at least two thousand children and that it be no greater than sixty percent of the enrollment of the existing school district from which the school district will be organized, (ii) the newly-formed district have an actual valuation per total wealth pupil unit at least equal to the statewide average, and (iii) the enrollment of the existing school district from which the new district is formed equal at least two thousand children, excluding the residents of the municipality (Education Law § 1504[3][a], as added by L.1997, ch. 390).

Plaintiffs Louis Grumet and Caroline Shipley, citizen taxpayers,[4] commenced the present action against the Governor and various departments and officials, the Board of Education of the Kiryas Joel Union Free School and Monroe-Woodbury, challenging the constitutionality of Chapter 390 under both the Federal and State Constitutions. The court concluded that Chapter 390 definitively applies to only two municipalities--Kiryas Joel and one other--and that the law represented unequivocal but impermissible favoritism by the State to the Satmar community. The court granted plaintiffs' motion for summary judgment and permanently enjoined defendants "from taking any and all present, future action or expending any State monies or resources for the purpose of implementing Chapter 390 of the Laws of 1997."

The Appellate Division unanimously affirmed, agreeing that the record supports the conclusion that the new statute

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[4] At the outset of the controversy the New York State School Boards Association, Shipley and Grumet were named plaintiffs. Although, technically, the Association was dismissed for lack of standing, the record continues to reflect plaintiffs' counsel as the New York State School Boards Association.

applies to only two of the State's 1,545 municipalities and concluding that Chapter 390 is not a " 'truly religious- neutral law of general applicability * * * [available to] a broad array of eligible municipalities' " (*Grumet v. Pataki*, 244 A.D.2d 31, 36, 675 N.Y.S.2d 662, quoting *Grumet v. Cuomo*, 90 N.Y.2d, *supra*, at 75). The Appellate Division further concluded that Chapter 390 failed the second prong of the *Lemon* test because it "clearly provides an impermissible preference to the Village in response to the Satmars' desire to provide their handicapped children with special education services in an exclusive Satmar environment" in light of the statute's legislative history and context (*id.*, at 36-37).

Finally, the Appellate Division noted that the Supreme Court's decision in *Agostini v. Felton* (521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391) overruled the Court's prior decision in *Aguilar v. Felton* (473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290, *supra*). Thus, Monroe-Woodbury was no longer precluded from offering Kiryas Joel's children special educational services at the Hasidic school. Accordingly, the court stated that "the fact that the underlying reason for the creation of the challenged school districts has now been eliminated also supports plaintiffs' assertion that Chapter 390 should be perceived as yet another improper endorsement by the Legislature in providing the Satmar community the continued existence of a publicly funded exclusive environment in which to educate their children in accordance with their religious preferences" (244 A.D.2d, at 37, 675 N.Y.S.2d 662).

Defendants appealed as of right, and we now affirm the order of the Appellate Division.[5]

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[5] On this appeal, the American Jewish Congress submitted a brief *amicus curiae* arguing that Chapter 390 is unconstitutional, and the Becket Fund for Religious Liberty argued that the statute is constitutional.

II.

The Establishment Clause of the First Amendment of the Federal Constitution, made applicable to the States through the Fourteenth Amendment, prescribes that "Congress shall make no law respecting an establishment of religion" (U.S. Const. 1st Amend.). The Establishment Clause ensures that neither the State nor the Federal government "can pass laws which aid one religion, aid all religions, or prefer one religion over another" (*Everson v. Board of Education*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711). The clause requires that states be "neutral in * * * [their] relations with groups of religious believers and nonbelievers" (*id.*, at 18). Applying these fundamental neutrality principles, this Court has stated that "statutes of general applicability that extend their benefits without regard to religion honor the neutrality requirement and are generally beyond Establishment Clause reproach" (*Grumet v. Cuomo*, 90 N.Y.2d, *supra*, at 69). On the other hand, the Establishment Clause is violated when a sectarian school enlists "the machinery of the State to enforce a religious orthodoxy" (*Lee v. Weisman*, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467).[6]

Significantly, the facial neutrality of a law is not dispositive (*id.*, *citing Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 ["The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination"]). In determining whether a statute comports with fundamental Establishment Clause principles, and is "truly religion-neutral and generally

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[6] While the dissent correctly notes that statutes are presumptively constitutional, that doctrine cannot insulate a statute that violates fundamental neutrality principles (*see*, e.g., *Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*).

applicable," a court must scrutinize the law both in form and effect (*Grumet v. Cuomo*, 90 N.Y.2d, *supra*, at 70).

Considering both the form and the effect of the statute now before us, we conclude that Chapter 390 violates fundamental Establishment Clause neutrality principles. Although Chapter 390 sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect (*Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 US, *supra*, at 703). Presently, Chapter 390 potentially benefits only the Village of Kiryas Joel and one other of the State's 1,545 municipalities--the Town of Stony Point.[7] In practical effect, therefore, the religious community of Kiryas Joel is not "merely one in a series of many communities" eligible for equal treatment under Chapter 390's special school district laws (512 US, *supra*, at 703-704; *see also, Grumet v. Cuomo*, 90 N.Y.2d 57, 73, 659 N.Y.S.2d 173, 681 N.E.2d 340).[8] That

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[7] The dissent cites a 1997 memorandum submitted by the Governor in support of the statute's enactment, noting that ten municipalities would be eligible to form school districts under Chapter 390 (dissent, pp. 15). Both lower courts, however, concluded from the record statistics that only two are eligible--- Kiryas Joel and Stony Point. Appellants themselves do not assert that there are ten eligible municipalities. Appellants themselves say only that the number of present and future municipalities that qualify under the statute "remains uncertain" and "may exceed" the two that have been identified. They identify no additional eligible municipalities. Defendants' tenuous and speculative assertions that other municipalities will qualify under the statute's criteria in the future raise only "theoretical possibilities" that lend no meaningful support to the contention that Chapter 390 is a religion-neutral law of general applicability (*Kiryas Joel II*, 90 N.Y.2d 57, 71, 73, 659 N.Y.S.2d 173, 681 N.E.2d 340).

[8] We do not apply a "precedentially unsupported" "broad spectrum theory" here (dissent, pp. 13-17). *See, Widmar v. Vincent*, 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440, *supra*; *Board of Educ. of the Westside Comm. Schools v. Mergens*, 496 U.S. 226, 252, 110 S.Ct. 2356, 110 L.Ed.2d 191; *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673,

only two municipalities in all of New York State qualify under Chapter 390 underscores the fact that groups finding themselves in a situation similar to that confronting the Satmar community will be unable to avail themselves of the statute's benefits. Indeed, because the statute's qualifying criteria are consciously drawn to benefit Kiryas Joel, other communities--both religious and secular--with similar educational needs will not have equal opportunity to create a publicly-funded school district under Chapter 390. Thus, the non- neutral effect of the statute is to secure for one religious community a unique and significant benefit--a "public school" where all the students adhere to the tenets of a particular religion--unavailable to other, similarly situated communities. In doing so, Chapter 390 violates Establishment Clause principles by preferring one religion over others (512 US, *supra*, at 703).

Chapter 390 eliminated some of the fatal flaws of Chapter 241--its unconstitutional predecessor--but the effect of the two statutes is virtually identical. Although only one municipality--Kiryas Joel--qualified under the prior statute, it does not follow that Chapter 390--by allowing one additional municipality to qualify under the statute--is a general, religion-neutral law. Indeed, while it is true that Chapter 390 eliminated the two qualification criteria of Chapter 241 that were devoid of any legitimate purpose and plainly intended to limit eligibility under the statute to Kiryas Joel, the new statute

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90 S.Ct. 1409, 25 L.Ed.2d 697, *supra*; *Bowen v. Kendrick*, 487 U.S. 589, 608, 108 S.Ct. 2562, 101 L.Ed.2d 520; *Kiryas Joel II*, 90 N.Y.2d, *supra* at 70, 75; *Grumet v. Cuomo*, 90 N.Y.2d 57, 70, 75, 659 N.Y.S.2d 173, 681 N.E.2d 340. Moreover, *Agostini* does not support the proposition that, in determining secular effect, courts need not consider whether a challenged State action benefits a broad spectrum of groups (dissent, pp. 14-15; *see, Agostini*, 521 US, at 233, *supra* [*citing Widmar*, 454 US, at 274, *supra*, for the proposition that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect"]).

fails to eradicate the earlier statute's overriding flaw. The eligibility requirements under Chapter 390 are still limited in such a way that permits the statute's benefits to flow almost exclusively to the religious sect it was plainly designed to aid. Thus, like its predecessor, Chapter 390 is not a neutral law of general application.[9]

III.

In assessing the constitutionality of governmental action under the Establishment Clause, the Supreme Court of the United States has employed a number of tests, reflecting that not all cases are susceptible of review under a single standard (*see,* e.g., *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467; *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472; *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33; *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019).

The standard most often used is the tripartite test of *Lemon v. Kurtzman* (403 U.S. 602), which requires that legislation have a secular purpose, that its principal effect neither advance nor inhibit religion, and that it not foster excessive entanglement between church and state. In recent years, the Supreme Court has questioned the *Lemon* test, but has not

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[9] This Court, in *Grumet v. Cuomo* (90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*), did not suggest the outlines of Chapter 390 (*see,* dissent, pp. 7, 20-21). The Court identified two eligibility criteria in Chapter 241 that were devoid of any legitimate purpose, but never suggested that mere deletion of those defective provisions would render the statute constitutional. To the contrary, the Court observed that "the Legislature might have achieved a constitutionally acceptable result had it enacted a truly religion-neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of eligible municipalities, might have invoked" (*id.*, at 75, 659 N.Y.S.2d 173, 681 N.E.2d 340). That was not done.

abandoned it. Indeed, in *Agostini v. Felton* (521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391), the Court observed:

> "To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. * * * Likewise, we continue to explore whether the [government action] has the 'effect' of advancing or inhibiting religion" (*id.*, at 222—223).

Agostini thus makes clear that the second prong of the *Lemon* test--the requirement that a law's "primary effect must be one that neither advances nor inhibits religion"--remains a consideration in assessing whether the Establishment Clause has been violated. Thus, the question in this case continues to be whether Chapter 390 of the Laws of 1997 has the effect of advancing one religion over another. We conclude that it does.

Agostini, the most recent Supreme Court pronouncement on the application of Establishment Clause principles, presented a situation different from the one now before us. In *Agostini* the Supreme Court reviewed whether the placement of public school employees in parochial schools, under Title I of the Elementary and Secondary Education Act for the purpose of providing remedial education to disadvantaged children, resulted in the impermissible effect of advancing religion. As such, the Court's "effects inquiry" necessarily focused on whether the presence of public school teachers in parochial school classrooms results in religious indoctrination or the inculcation of religious messages, creating the impression of a "symbolic union" or an "excessive entanglement" between church and State (521 US, *supra*, at 222-223, 232-233).

The Court concluded that having public school teachers provide services to students in parochial schools does not have an impermissible effect because it does not result in governmental indoctrination, define its recipients by reference to religion or create excessive governmental entanglement with religion (521 US, *supra*, at 234). Under Title I, a broad spectrum of disadvantaged children--from both secular and religious schools--would be provided the same benefits on a nondiscriminatory basis and as a result, the Court noted, such aid was less likely to have the effect of advancing religion (*id.*, at 231; *see also, id.*, at 210 [only 10% of the total number of students eligible for Title I services are private school students attending sectarian schools; some 183,000 children nationwide received Title I benefits]). The Court further noted that such a program could not be viewed as an endorsement of religion (*id.*, at 235).

Unlike *Agostini*, the act under review here does not fall into one of the two usual types of Establishment Clause cases: Chapter 390 neither provides public aid to a parochial school nor prescribes religious practices for a public school. Rather, it delegates to a religious group the governmental power to form its own public school district, which carries with it vast powers (*see, Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist.*, 81 N.Y.2d 518, 537, n. 5, 601 N.Y.S.2d 61, 618 N.E.2d 94 [Kaye, J., concurring]). Thus, even more directly pertinent to our analysis is *Kiryas Joel I* (512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546, *supra*), with facts and issues similar to those now before us. In *Kiryas Joel I*, the Supreme Court, implicitly relying upon *Lemon's* second prong, concluded that the statute creating the Kiryas Joel School District was unconstitutional because it provided a benefit to the Satmar community that was not provided equally to other groups (512 US, at 703-704, *citing Larkin v. Grendel's Den*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297). The Court concluded that by singling out

Kiryas Joel for special treatment, as opposed to making the statutory benefits available to "many communities," the statute violated the principle of neutrality to which all permissible religious accommodations must adhere (*id.*; *see also, id.*, at 703 [because statute was so narrowly drawn, it provided "no assurance that the next similarly situated group seeking a school district of its own will receive one"]). The Court determined that the statute constituted an impermissible religious accommodation under the Establishment Clause and focused on the fact that the statute's exclusive delegation of significant governmental power to a religious sect failed to ensure that similarly situated groups would also be able to avail themselves of that power (*id.*, at 705-708).

This Court's unanimous decision in *Grumet v. Cuomo* (90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*), three years after the Supreme Court's decision in *Kiryas Joel I*, also provides guidance. Analysis of whether Chapter 241 was a "truly religion-neutral and generally applicable" law was based on the fundamental neutrality principles expressed by the Supreme Court's many Establishment Clause cases, including *Kiryas Joel I*. This Court, noting that the Supreme Court had recognized as an important index of secular effect the " 'provision of benefits to [a] broad * * * spectrum of groups,' " found that the corollary to that proposition was also true--namely, that the "provision of a governmental benefit to a restricted class * * * formed along religious lines * * * is a telling index of nonneutral sectarian effect" (*id.*, at 70, *citing Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440, *supra*; *Board of Educ. of the Westside Comm. Schools v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191). Applying established neutrality requirements, the Court concluded that Chapter 241 had the nonneutral effect of allowing only Kiryas Joel to reap the statute's benefits, without providing the same opportunity to other groups.

As such, even though the statute was facially neutral and did not specifically name the Village of Kiryas Joel--as was the case in *Kiryas Joel I*--it still could not be considered a generally applicable, religion-neutral law (*id.*, at 73 [statute did not provide benefits to Satmar community " 'simply as one of many communities eligible for equal treatment under a [truly] general law' "], *citing Kiryas Joel I*, 512 US, at 703, *supra*). Furthermore, the Court determined that Chapter 241 failed the second prong of the *Lemon* test because its actual and perceived effect was solely to advance the interests of the Satmar community[10] (*id.*, at 73-76). The Court also noted that "the Legislature might have achieved a constitutionally acceptable result had it enacted a truly religion-neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of eligible municipalities, might have invoked" (*id.*, at 75).

In sum, while several standards have been employed by the Supreme Court to determine the constitutionality of a statute under the Establishment Clause, they all build upon the same foundation: fundamental neutrality principles. Indeed, to consider whether a statute has the impermissible effect of advancing religion or constitutes an impermissible religious

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[10] While the status of the endorsement test employed by this Court in *Grumet v. Cuomo* is uncertain, consideration of a statute's actual effect--the central focus of our analysis here--remains a valid inquiry in determining whether a law has the primary effect of impermissibly advancing religion (*see, Agostini*, 521 US, at 222-223, *supra*; *see also, id.*, at 235 [the same considerations that led the Court to conclude that Title I did not have the effect of advancing religion also required the Supreme Court "to conclude that [the program] cannot reasonably be viewed as an endorsement of religion"]; Martha M. McCarthy, *The Road to Agostini and Beyond*, 124 Ed. Law Rep. 771 [*Agostini* can be read as "providing modest support" for the endorsement standard championed by Justice O'Connor in reviewing Establishment Clause claims]; but *see,* dissent, pp. 14-15 [questioning viability of endorsement test in the wake of *Agostini*]). In any event, we do not employ an endorsement analysis in this case.

accommodation is essentially to examine both sides of a coin. Under either inquiry, a statute so narrowly drawn that it delegates a significant governmental power almost exclusively to a single religious group, and provides no assurance that the statute's benefits will be equally available to others, is unconstitutional.

IV.

Drawing on Supreme Court precedents, as well as our own case law, we conclude that, for many of the same reasons Chapter 390 violates fundamental Establishment Clause neutrality principles, it has the primary effect of advancing one religion over others and constitutes an impermissible religious accommodation.

The events surrounding the enactment of Chapter 390 offer strong support for the conclusion that Chapter 390 has the effect of advancing the religious beliefs of the Satmars over others. The legislative history of Chapter 390 reveals that it was enacted in direct response to *Kiryas Joel II* and with the intent to accomplish what previous legislative efforts had failed to accomplish: provide the residents of Kiryas Joel with an exclusively Satmar "public school" environment, at taxpayer expense, in which to educate their children. Indeed, the legislative debates reveal that the law was referred to as the "Kiryas Joel School Bill" and that Chapter 390 was commonly referred to as "Kiryas Joel No. 3" (New York State Assembly, L.1997, ch. 390, Legislative Debates, August 4, 1997, at 88).

That Chapter 390 was designed to accommodate the needs of the religious community of Kiryas Joel is not, however, what renders it unconstitutional. Indeed, a statute accommodating a religious group does not automatically create the impermissible effect of advancing religion (*Kiryas Joel I*, 512 US, *supra*, at 705-706; *see also, Agostini*, 521 US,

supra, at 233). Supreme Court precedent makes clear that a statute accommodating religious needs by alleviating special burdens will not have the primary effect of advancing religion so long as the secular effect of the statute is sufficiently separable from its religious impact and the class benefitted by the statute is sufficiently broad (*see, Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*; *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 768; *Widmar v. Vincent*, 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440, *supra*; *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673, 90 S.Ct. 1409, 25 L.Ed.2d 697, *supra*; *Mueller v. Allen*, 463 U.S. 388, 397, 103 S.Ct. 3062, 77 L.Ed.2d 721). In other words, a permissible accommodation must honor the principle of neutrality as among religions (*Kiryas Joel I*, 512 US, *supra*, at 706-707; *id.*, at 705 ["there is 'ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference' "]).

Applying the foregoing principles here, it is clear that Chapter 390 does not constitute a permissible religious accommodation. The class benefitted under Chapter 390 is anything but broad. Recognition of the fact that the statute benefits an extremely narrow class of municipalities is not a mere exercise in arithmetic or counting (*see,* dissent, pp. 13, 16). The Supreme Court has held that the provision of benefits to a "broad * * * spectrum of groups is an important index of secular effect"[11] (*Widmar v. Vincent*, 433 U.S. 229, 274, 97 S.Ct. 2593, 53 L.Ed.2d 714, *supra*; *see also, Kiryas Joel I*, 512 US, *supra*, at 703 [because Kiryas Joel "did not receive its

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[11] Contrary to the dissent's reading of the majority opinion as holding that statutes that do not apply to a sufficiently broad spectrum of religious groups will automatically be considered unconstitutional, there is nothing in our analysis that stands for that proposition (dissent, pp. 12 [*citing* majority opn, pp. 22-24]).

new governmental authority simply as one of many communities eligible for equal treatment under a general law," neutrality could not be assured]; *Board of Educ. of the Westside Comm. Schools v. Mergens*, 496 U.S. 226, 252, 110 S.Ct. 2356, 110 L.Ed.2d 191, *supra* [statute did not have the primary effect of advancing religion where high school Christian club was merely one in a broad spectrum of clubs granted benefits thereunder]; *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673, 90 S.Ct. 1409, 25 L.Ed.2d 697, *supra* [property tax exemption for religious properties upheld where it applied to "broad class of property owned by nonprofit, quasi-public corporations," not just religious groups or churches]; *Bowen v. Kendrick*, 487 U.S. 589, 608, 108 S.Ct. 2562, 101 L.Ed.2d 520 [statute enlisting "wide spectrum of organizations" upheld]; *Kiryas Joel II*, 90 N.Y.2d, *supra*, at 75 [a truly religion-neutral law of general applicability would apply to Kiryas Joel as "one in a broad array of eligible municipalities"]). Given Chapter 390's applicability to only two municipalities--one of which is a religious sect clearly intended to be the statute's beneficiary--the secular effect of the statute is virtually indiscernible.[12]

Taking into account both the origin and operation of the statute, therefore, the conclusion is inescapable that Chapter 390 has the primary effect of advancing religion and constitutes an impermissible accommodation (*Kiryas Joel I*, 512 U.S. 687, 698, 706-707, 114 S.Ct. 2481, 129 L.Ed.2d 546, *supra*; *see also, Grumet v. Board of Educ.*, 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94, *supra*; *Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*).

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[12] Any analogy between Chapter 390 and Village Law § 2-200, under which Kiryas Joel incorporated, is misplaced (dissent, pp. 11-12). Indeed, the Village Law provides a good example of a religion-neutral, generally applicable law that applies to a broad spectrum of beneficiaries, and a good contrast to Chapter 390.

V.

As we previously noted, Chapter 748 was enacted in response to the situation in which Kiryas Joel was placed after *Aguilar*, and to address the conflict that ensued between Monroe-Woodbury and Kiryas Joel (*Grumet*, 81 N.Y.2d, *supra*, at 525, *citing* Governor's Approval Mem., 1989 N.Y. Legis. Ann., at 324). The subsequent legislation is an effort to address the same problems. Since *Agostini*, the Supreme Court has eliminated the obstacle posed by *Aguilar* to the education of the handicapped children in an exclusive Satmar setting. As noted in the legislative debates by opponents of Chapter 390: "This legislation is legislation * * * that is not necessary. If given time and given the inclination to make the process work, students who are designed to be aided could be aided without this legislation" (New York State Assembly, L.1997, ch. 390, Legislative Debates, August 4, 1997, at 90). As such, the Appellate Division properly concluded that enacting Chapter 390 would likely be perceived as a religious preference in light of the arguably constitutionally permissible alternative *Agostini* has provided.

Given the foregoing conclusions, we need not address the challenges posed under the State Constitution.

We conclude with an observation that we hope has not been lost on parties who have been locked in litigation for more than a decade. The genesis of all this legislation and litigation--the seeming insurmountability of *Aguilar v. Felton*--- no longer exists. It is now possible, compatibly with the Federal Constitution, to do what the parties wanted to do before *Aguilar* stopped them. Given this new opportunity, we strongly suggest that the parties make every effort to reach an accord that will benefit the children, and themselves. This is far preferable to the costly and inevitable prospect of further

legal strife.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

BELLACOSA, J. (dissenting):

Respectfully, we would declare Chapter 390 of the Laws of 1997 constitutional. Thus, our vote is to reverse the order of the Appellate Division.

The constitutional cornerstone of this statute rests on three strong pillars: (1) the presumption of constitutionality afforded to every enactment of the Legislature; (2) the lack of any persisting or new constitutional faults under presently governing Establishment Clause jurisprudence; and (3) the explicit removal from Chapter 390 of previously adjudicated constitutional defects.

I.

Initially, the "simple, but well-founded, presumption that an act of the Legislature is constitutional * * * can be upset only by proof persuasive beyond a reasonable doubt" (*Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y.*, 46 N.Y.2d 358, 370, 413 N.Y.S.2d 357, 385 N.E.2d 1284 [citations omitted]). Indeed, this Court frequently prefaces its statutory analyses with the acknowledgment that a legislative enactment derives from a "co-equal branch of government", and any challenger trying to undo a statute bears a heavy burden (*City of New York v. State of New York*, 76 N.Y.2d 479, 485, 561 N.Y.S.2d 154, 562 N.E.2d 118; *see also, Elmwood-Utica Houses v. Buffalo Sewer Auth.*, 65 N.Y.2d 489, 495, 492 N.Y.S.2d 931, 482 N.E.2d 549).

As a corollary to these fundamental premises, a "further

presumption, long recognized by this court, [is] that the Legislature has investigated and found facts necessary to support the legislation * * * as well as the existence of a situation showing or indicating its need or desirability" (*Hotel Dorset Co. v.Trust for Cultural Resources* of City of N.Y., *supra*, at 370, 413 N.Y.S.2d 357, 385 N.E.2d 1284 [citations omitted]). Balancing the myriad policy and empirical considerations that affect lawmaking is a function entrusted by the Constitution to the Legislature, the elected representatives of the people; courts are obliged therefore to be exceedingly wary of substituting their own balancing exercises (*see, Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 600 N.E.2d 191). In particular, courts owe respectful attentiveness "to public funding programs essential to addressing the problems of modern life, unless such programs are 'patently illegal' " (*Schultz v. State of New York*, 84 N.Y.2d 231, 241, 616 N.Y.S.2d 343, 639 N.E.2d 1140, *citing Hotel Dorset Co. v.Trust for Cultural Resources*, *supra*).

Chapter 390 of the Laws of 1997 allows some public funding to qualifying municipalities through the instrumentality of a separate public school district. It is uncontroverted that the Legislature's initial impetus for crafting an enactment was to redress a modern educational conundrum encountered by the Village of Kiryas Joel with respect to some of its neediest citizens, its handicapped children. It is also undisputed that when the two prior versions of statutory authorization were declared constitutionally faulty, the Legislature corrected the identified problems. Indeed, it is now three times that different Legislatures have passed, and different Governors have approved, legislation to address the conceded concerns of these needy children within the environment of their civic community.

We dissenters examine the legislation as enveloped, not "insulated" as the Majority suggests, by its traditional array of

presumed legitimacy (slip op at 12, n6). From our well-established analytical perspective, the Legislature meets all constitutional prescriptions, including those previously delineated by this Court.

II.

In May 1997, this Court nullified chapter 241 of the Laws of 1994, the Legislature's second attempt to allow the people of the incorporated Village of Kiryas Joel to form a separate public school district. This Court found the definition of municipality as the principal flaw because it was limited, such that no existing municipality, aside from Kiryas Joel met, or probably ever could meet, the statutory requirement.

This Court unanimously agreed that the statutory effect of singling out the Village of Kiryas Joel in this manner violated the second prong of the *Lemon* test, which mandates that government action cannot have a principal or primary "effect" of advancing or inhibiting religion. Also relying on an "endorsement" examination, this Court noted that even when a challenged statute appears neutral on its face, the Supreme Court has guarded against State action that is sufficiently likely to be perceived by adherents of a religion as an endorsement and by nonadherents as a disapproval of their religious or nonreligious choices (*see, Grumet v. Cuomo*, 90 N.Y.2d 57, 74, 659 N.Y.S.2d 173, 681 N.E.2d 340, *citing School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, overruled in part by *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391).

A month later, in June 1997, the Supreme Court of the United States decided *Agostini v. Felton* (521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391, *supra*). It scrutinized the evolution of Establishment Clause jurisprudence since the 1984 decision of *Aguilar v. Felton* (473 U.S. 402, 105 S.Ct.

3232, 87 L.Ed.2d 290) and overruled it. Ironically, *Aguilar* had triggered the initial difficulties between the Village of Kiryas Joel and the Monroe-Woodbury School District. The Supreme Court, in *Agostini*, without expressly indicating so, compressed the *Lemon* test into two prongs--(1) whether the government acted with a secular purpose; and (2) whether the government aid has the "effect" of advancing or inhibiting religion, which includes an examination of whether the aid results in an excessive entanglement between church and state (*see, Agostini v. Felton, supra*, at 222-223, 232-233; *see also,* Baxter, *Managing Legal Change: The Transformation of Establishment Clause Law*, 46 UCLA L Rev 343, 399-409 [1998]).

Indeed, the *Agostini* Court went into great detail about changes in the contours of this jurisprudence since its *Aguilar* and *Ball* decisions; specifically, changes emerged in the Supreme Court's understanding of the criteria used to assess whether aid to religion has an impermissible effect (*see, Agostini v. Felton, supra*, at 223). The Supreme Court stated that the "three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion" are: whether the aid results in governmental indoctrination; whether aid recipients are defined by reference to religion; and whether an excessive entanglement is created (*id.*, at 234).

Applying these criteria, *Agostini* stated that "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis", there is a less likely effect, of advancing religion (*id.*, at 231). The Supreme Court very significantly and specifically noted that *Ball* and *Aguilar* had not considered this important result of neutral criteria (*id.*, at 231). Further, using the same delineated "effects" considerations to perform an "endorsement" analysis, the Supreme Court also did not find

an endorsement of religion where funding was provided on a neutral basis (*id.*, at 235; *see also,* Baxter, 46 UCLA L Rev, *supra*, at 409). Accordingly, *Agostini* overruled *Aguilar* and the pertinent parts of *Ball* (*see, Agostini v. Felton*, *supra*, at 236). In particular, the *Agostini* court noted that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid" (*id.*, at 229).

It was at this key point in the maturity of the First Amendment (Establishment and Free Exercise of Religion) that the New York State Legislature, in August 1997, enacted Chapter 390 of the Laws of 1997.

III.

Since the examination of the first statutory effort in 1989, various courts have indicated that a neutral statute would be constitutionally acceptable. The Supreme Court of the United States indicated that the 1989 statute, which referred to Kiryas Joel by name, was too narrow considering the religious nature of the Village and the "anomalously case-specific nature of the legislature's exercise of state authority" (*Board of Ed. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S. 687, 703, 114 S.Ct. 2481, 129 L.Ed.2d 546, *affirming Grumet v. Board of Educ. of Kiryas Joel Vil. School Dist.*, 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94). Justice O'Connor, however, suggested that "[a] district created under a generally applicable scheme would be acceptable even though it coincides with a village that was consciously created by its votes as an enclave for their religious group" (*id.*, at 717 [O'Connor, J., concurring]).

Then, this Court found that the 1994 version of the statute, which was considered facially neutral, still did not insure appropriate neutrality in application. Due to the "nonneutral

effect of allowing the religious community of Kiryas Joel, but no other group at this time and probably ever, to create its own school district," the statute was deemed unconstitutional (*Grumet v. Cuomo*, 90 N.Y.2d 57, 69, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*). On the other hand, the Court said that, "statutes of general applicability that extend their benefits without regard to religion honor the neutrality requirement and are generally beyond Establishment Clause reproach" (*id.*, 90 N.Y.2d 57, 69, 659 N.Y.S.2d 173, 681 N.E.2d 340).

Thus, at this Court's explicit suggestion, the Legislature, in Chapter 390 of the Laws of 1997, removed the defects of the second statute, particularly the singular focus and effect of the definition of municipality (*see, id.*). It cannot be denied that Chapter 390 does not limit the effect of its remedial authorization to the Village of Kiryas Joel alone; it definitionally expands the reach of the statutory authorization to at least one actual, additional secular entity, and countless potential others.

The Court is unanimous that, in ruling on Chapter 390, this Court is bound-- until the Supreme Court specifically chooses to further recalibrate or overrule *Lemon*--to apply the Establishment Clause principles promulgated in *Agostini*. Our application, however, of *Agostini's* version of the *Lemon* test leads us as dissenters to the conclusion that Chapter 390 has a clear secular purpose. It provides a "mechanism by which the governing body of a municipality can initiate the process of forming a school district" (Governor's Mem. approving L.1997, ch. 390, 1997 N.Y. Legis. Ann., at 259). Even the purpose of the original statute was to obtain the secular goal of educating the handicapped children of Kiryas Joel (*see,* Governor's Mem. approving L.1989, ch. 748, 1989 N.Y. Legis. Ann., at 324-325; *Grumet v. Board of Educ. of Kiryas Joel Vil. School Dist.*, 81 N.Y.2d 518, 550, 601 N.Y.S.2d 61, 618 N.E.2d 94, *supra* [Bellacosa J., dissenting]).

Further, the government "aid" here does not have the effect of advancing religion. Quite to the contrary, it simply grants permission to any qualifying municipality to create its own public school district. After *Agostini*, it is no longer presumed that improper religious indoctrination will occur even in a parochial school sectarian setting (*see, Agostini v. Felton, supra*, at 223). Thus, no justification exists for the conclusion that the public school district at issue, which is coterminous with the boundaries of the Village of Kiryas Joel, will function any differently from any other public school district. Indeed, the record of the Kiryas Joel School District shows scrupulous adherence to secular personnel, administration, syllabi, and teaching methods--and equally scrupulous avoidance of sectarian, religious instruction or indoctrination.

The direct "aid recipients" here are any qualifying municipalities. They are defined without reference to religion and with reference only to neutral secular criteria that were emphasized in this Court's previous adjudication concerning this intractable conflict. Indeed, the recognized population and wealth criteria are the typical factors used in effective legislation. Pursuant to *Agostini*, courts must accord weight to the neutrality of these qualifying factors as evidence that no improper effect or endorsement of religion occurs (*see, id.*, at 231). Also, it is entirely appropriate to acknowledge the ultimate "aid recipients"--handicapped children in need of special, secular education.

Finally, no excessive entanglement is engendered by Chapter 390. "[T]o assess entanglement, we have looked to 'the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority' " (*id.*, at 232 [citations omitted]). Here, the

institutions initially benefitted are municipalities conscientiously endeavoring to serve their constituents, and the Village of Kiryas Joel is such an incorporated municipality. Contrary to a fundamental fallacy expressed in the Majority's analysis (slip op at 20-21), the resulting relationship is not between government and a religious entity, but between the State and its municipal subdivisions, which includes the Village of Kiryas Joel. The State can provide "aid" in the form of a new school district for any qualifying municipality, much as it can now provide pre-*Aguilar* "aid" to any qualifying parochial school.

The Supreme Court exercised care in *Agostini* to extricate its jurisprudence from its own misstep and to explicate the current state and sophisticated nuances of Establishment Clause precedents. However, the Majority here, in effect transforms the *Agostini* lesson into an instrument of unremitting invalidation of State legislation.

IV.

It is necessary to address some specific and key differences that we have with the Majority's multi-faceted rationale. First, a fundamentally flawed reliance is placed on an examination of whether this statute provides an impermissible accommodation of religion. A corollary of the Majority's inquiry in this regard searches for whether a sufficiently "broad spectrum" of groups is benefitted. Further, the constitutional, analytical mix pivots off the legislative "history" and "origin" of the statute (slip op at 21-24); that is a faulty starting point. Finally, the Majority's invocation of the possibility of a renewed availability of the pre-*Aguilar* municipal options is wholly inapplicable (contrast, *Marbury v. Madison*, 52 U.S. [1 Cranch] 137 [1803] [on the establishment of the seminal doctrine of judicial review, within limitations, however, of the fundamental separation of powers doctrine]).

A. Religious Accommodation

The Majority chooses to follow an analysis performed earlier by the United States Supreme Court in *Kiryas Joel I*, without the subsequent enlightenment of *Agostini*, because the "facts and issues" before this Court are more similar, as they see it, to those addressed in *Kiryas Joel I* (slip op at 18). However, the Majority ignores the critical fact that the statute now at issue is significantly different from the statute struck down in *Kiryas Joel I*. It had specifically named the Village of Kiryas Joel as the sole beneficiary of the first legislative effort. Under that structure, as this Court and the Supreme Court discerned, there was simply no guarantee that any other similarly situated group would garner the same benefits (*see, Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S. 687, 703, 114 S.Ct. 2481, 129 L.Ed.2d 546, *supra*). The initial statute constituted an impermissible accommodation because it transferred political authority directly to a single religious group (*id.*, at 706).

In finding an impermissible accommodation under the initial statute, the Supreme Court contrasted the statute with the "neutral" Village Law under which Kiryas Joel had incorporated (*id.*, at 703). Significantly, this law permits any group meeting certain "population and area requirements" to incorporate (Village Law § 2-200). It cannot be denied that Chapter 390 also utilizes such neutral population and area requirements to transfer political authority to any qualifying municipality. Thus, the new statute has corrected the aspects of the legislation that failed the accommodation analysis in *Kiryas Joel I*, and the Majority nevertheless interposes a reconstituted standard in this regard.

This shaky accommodation concern incorporates another facet of the Majority view that we dissenters view

differently--the reliance on something dubbed a sufficiently "broad spectrum" standard. Besides being precedentially unsupportable, the resulting inquiry demonstrates the "moving target" and "slippery slope" nature of the latest invalidation test. For example, no court ever proposed that the problem with Chapter 390 could be solved by making it apply to other religious groups. Yet, the Majority now suggests that the application to secular, as well as religious groups, is not enough. If the statute does not apply to a sufficiently "broad spectrum" of *religious* groups, then the Majority concludes that it has the impermissible effect of advancing one religion over others--an impermissible accommodation (*see,* slip op at 22- 24). That is plainly wrong.

B. Sufficiently "Broad Spectrum" Standard

The Court propounds today that Chapter 390 is not a permissible accommodation because the class benefitted by it is "anything but broad" (slip op at 22). Ancillary to this determination is the discrete objection that the eligibility requirements of the statute are "so narrowly drawn" as to prevent other similarly situated groups from qualifying for the statute's entitlements.

Initially, this inverted analysis ignores the presumption of constitutionality beyond a reasonable doubt. It also devalues the constitutional burden into a mere counting exercise. Under the standard presumption of constitutionality, the challengers against Chapter 390 must bear the burden to demonstrate the practical impossibility of any general application of the legislation. Challengers did just that in *Kiryas Joel II.* Quite differently here, the Majority's insistence upon a showing that Chapter 390 immediately applies to a sufficiently "broad spectrum" of existing municipalities effectively switches the judicial review standard into a presumption of unconstitutionality. Moreover, it shifts the burden of

overcoming the transformed standard onto the defenders of the constitutionality of the statute.

While not expressly so stated, the Majority's concerns here appear to stem largely from some apprehension that the State action inhering in Chapter 390 will be perceived as an endorsement of Satmar Hasidism (*see,* infra, at 19). This concern was first reflected by this Court in *Kiryas Joel I*, which referenced *Grand Rapids School Dist. v. Ball* (*supra*). After *Agostini*, however, *Ball* and the perception of endorsement no longer provide the dispositive force that the Majority's rationale gives it under the guise of the "broad spectrum" requirement. The Majority flatly refuses to credit the neutral criteria of the statute itself because of a pre-determined concentration on its perceived sense of advancement of one religion over another.

Even if the proponents had to meet this amorphous constitutional standard, we note that it is not surprising that a sufficient population or wealth shift has not occurred over the short span of the statute's existence so as to allow the immediate qualification of more municipalities. Nor is it remarkable that no potential groups have yet undertaken the process of incorporating in order to pursue the benefits of a statute, the constitutionality of which has remained mired in controversy and litigation. The Majority's constitutional barrier--the impermissible accommodation due to an insufficiently "broad spectrum" of religious groups--cannot be dispositive or be given the prevailing weight that a constitutionality-reviewing Court inaptly confers in this case.

Furthermore, precedent does not support the application of this theory. Indeed, after *Agostini*, courts specifically need not look at how many religious or nonreligious groups benefit from a statute or challenged State action (*see, Agostini v. Felton*, *supra*, at 229-230). Even if we were to recognize and

conduct that analytical step, the current practical effect of Chapter 390 is that it is equally applicable to sectarian, as well as non- sectarian, municipal assemblages.

The Majority cancels Chapter 390 because it may presently be available to only two municipalities--one undeniably secular in every sense of the word. This contradicts relevant and longstanding precedent and legislative practices in this respect, as well as the expert proof adduced by the proponents of the enactment and expressly adopted by the Governor in signing the bill into law (*see,* Governor's Mem. approving L.1997, ch. 390, 1997 Legis. Ann., at 259 ["Data provided by the State Education Department show ten municipalities throughout the State which are currently eligible to form school districts under the criteria set forth in this legislation, in addition to those that can become eligible in the future "] [emphasis added]; *see also, Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 600 N.E.2d 191, *supra*). If the mere fact that the source for Chapter 390 is traceable originally to one municipality becomes a litmus test of constitutional dimension, the State would have many fewer statutes on its books and the courts can look forward to a lot more legislative review business on that challenge basis.

This Court has repeatedly upheld legislation which has an initial effect on only one municipality so long as the statute, on its face (with the formidable presumption of constitutionality also going for it), is general enough that application to other municipalities is real and available prospectively (*see, Matter of McAneny v. Board of Estimate & Apportionment of City of N.Y.*, 232 N.Y. 377, 392-393, 134 N.E. 187; *see also, Hotel Dorset Co. v. Trust for Cultural Resources*, *supra*, at 373, 413 N.Y.S.2d 357, 385 N.E.2d 1284). That is the nucleus and thrust of much programmatic, remedial legislation. At the very least, "there is no conclusive presumption to the contrary" (*McAneny v. Board of Estimate & Apportionment of City of*

N.Y., *supra*, at 393, 134 N.E. 187).

Thus, this Court's *Kiryas Joel II* decision establishes an uncontestable "given" for the review of Chapter 390--that the core requirement of a constitutional statute is that it must apply to other *municipalities* (*see, Grumet v. Cuomo*, 90 N.Y.2d 57, 75, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*). This one now does. Yet, the Majority substitutes a judicial, quantitative arithmetic analysis for the policy-empirical calculus that was used by the Legislature and the Governor (*see, Wolpoff v. Cuomo*, *supra*).

Also uncontested is the fact that it was perfectly proper for the citizens of Kiryas Joel to take advantage of State legislation that created the Village that exists today. This is "a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties" (*see, Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S. 687, 691, 114 S.Ct. 2481, 129 L.Ed.2d 546, *supra*). Indeed, it probably would have been unconstitutional to deprive these citizens of their right to incorporate simply because the geographic boundaries allowed a Village to be formed consisting solely of members of the same religious beliefs.

Once again, that very municipality similarly seeks to secure and take advantage of other generally applicable legislation. The Majority's decision today essentially, functionally and virtually forever forecloses this right for the citizens of the Village of Kiryas Joel; it deprives them of the opportunity afforded by Chapter 390 simply because the civil Village is the *first* municipal group to utilize the statutory enablement. Were other municipalities to precede Kiryas Joel in opting in under this legislation, just as other communities incorporated themselves as villages prior to Kiryas Joel, the courts would lack the power under the Establishment Clause to deny Kiryas Joel the same statutory benefit. It is sadly ironic

that the Legislature's overture to assist the handicapped children of this Village, who require special secular education needs, is again struck down simply because the children happen to be members of the Satmar Hasidim community within a duly incorporated civic Village.

C. Legislative History/Origin

The Majority's references to legislative history and origin (slip op at 21-24) undercut the tripartite system of governance, as well as sound constitutional theory. This approach implies that, because the Legislature has previously made mistakes, it cannot successfully cure its flaws. Under this novel postulate, initial legislative missteps will always emerge from buried stages to haunt legitimate, future efforts.

We respectfully suggest that it is at least equally necessary for the courts to place "history" and "origin", by whatever characterization, in context and to interpret a law as it is written. Instead, the Majority emphasizes that in its draft stages, the bill has been referred to as "*Kiryas Joel No. 3*" (slip op at 21), as though that title carried a constitutional infirmity, rather than simply reflecting the current legislative practice of attaching easily recognizable names to bills for better and broader understanding.

Here, the statute was, indeed, a "direct response to *Kiryas Joel II*" (slip op at 21). Considered from a neutral perspective, we view this fact as supportive, rather than destructive, of the legislative effort. This law, after all, is the result of a concept that has thrice received the deliberative action of both Houses of the State Legislature, two Governors of opposing political parties and has been shaped by decisions of the highest courts of this State and of the United States.

Further, if this Court ever thought that the "history" of this

matter would be a perpetual albatross carried through all later drafts and enactments, then it should not have opened the window of a possibly acceptable theory of constitutionality (*see, Grumet v. Cuomo*, 90 N.Y.2d 57, 75, 659 N.Y.S.2d 173, 681 N.E.2d 340, *supra*). Naturally, the Legislature pointedly and respectfully responded; we believe it did so successfully and constitutionally.

Ironically, the Majority's rejection of Chapter 390 fosters a tautological chase that the more the Legislature tries to accommodate concerns adjudicated by the Courts, the more the legislative cause is doomed by its ontology. No matter how many times the other two Branches of State government try to eradicate the Judiciary's perceived and delineated constitutional impediments, the effort loses, rather than gains, ground.

D. The pre-*Aguilar* Option

The Majority finally urges that Chapter 390 offends the neutrality mandated by the First Amendment because, in view of *Agostini*, Kiryas Joel may have an alternative means by which to provide its education services (slip op at 24-25)--again, an unsupportable "perception of endorsement" concern (*see, supra*, at 13-14). This mandate turns the constitutional analysis upside down. It does not control the constitutionality of the statute at issue, nor is it appropriate to this Court's analysis in this setting. This reliance on an abstract, premature option is, at best, advisory, and, at worst, it contradicts the legitimate presumption of constitutionality of the instant statute and creates an improper judicial balancing act in scrutinizing the constitutionality of the statute that was actually enacted (*see, supra*, Part I). Indeed, the very fact that the Monroe-Woodbury School District is a party urging the constitutionality of Chapter 390 more assuredly reflects that the pre-*Aguilar* system is not even a realistic option, no less a

pre-judged constitutional one.

This judicial musing is inappropriate. To support its theory, the Majority weakly relies on rhetoric from the losing side of the debate in the Legislature. This unlikely source simply cannot trump the overarching separation-of-powers presumptions by which this Court must be governed in ruling on the constitutionality of Chapter 390--the only enactment and issue before this Court at this time.

Finally, we generally agree with the Majority's exhortation that the two sides "make every effort" to reach an accord (slip op at 25) as that would be a most decorous solution to any litigation. In view of the history of this case, however, this proposal is particularly precatory. In the end, the role of this Court is to decide the case presented and establish the guiding precedent based on careful, precise constitutional analysis.

V.

The intractable drama of this dispute has a David and Goliath staging to it-- yet, it is difficult to decide who will be left standing in the end as the true victor or hero. This profound conflict represents a third constitutional crossroads for this Court and a potential fact pattern for a second review by the Supreme Court of the United States. The realm of Establishment Clause jurisprudence remains particularly conflicted as evidenced by this case. Until *Agostini*, cases seemed to increase the tension between the Constitution's traditional and fundamental guarantees of free exercise of religion and free association. Much remains unsettled, but, in one sense, *Agostini* provides a potent lesson that it is not un-American or unconstitutional to refuse to be absorbed into the melting pot.

The civic and legal activity of this Hasidic community has

been challenged through successive litigations for daring to go so far as to exercise a right to petition government repeatedly for redress. These citizens simply took their place in the long line of supplicants walking and working the corridors of power in the Statehouse. In this respect, they paradoxically conformed to society's methods. The core of objection against this minority community, through this and previous litigation, is that they have been *too* successful in not giving up their quest to gain the open and official attention of the Executive and Legislative Branches of government. Their perseverance and that of the Legislature and Governor are turned topsy-turvy into an instrument of invalidation of the lawmaking product of the other two Branches. This nullification is unwarranted and persuades us to dissent and vote to reverse and declare Chapter 390 constitutional.

Order affirmed, with costs.

Chief Judge Kaye and Judges Ciparick and Rosenblatt concur.

Judge Bellacosa dissents and votes to reverse in an opinion in which Judges Levine and Wesley concur.

APPENDIX B

LOUIS GRUMET et al., Respondents, v. GEORGE PATAKI, as
Governor of the State of New York, et al., Appellants.

81319

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

July 9, 1998, Entered

COUNSEL: Dennis C. Vacco, Attorney-General (Julie S. Mereson of counsel), Albany, for George Pataki and others, appellants.

George Shebitz & Associates, New York City, and Miller, Cassidy, Larocca & Lewin LLP (Nathan Lewin of counsel), Washington, DC, for The Board of Education of the Kiryas Joel Union Free School District, appellant.

Ingerman Smith LLP (Lawrence W. Reich of counsel), Northport, for Monroe-Woodbury Central School District, appellant.

Jay Worona, New York State School Board Association, Albany, for Louis Grumet and others, respondents.

Marc D. Stern, American Jewish Congress, New York City, for American Jewish Congress, amicus curiae.

Eric W. Treene, The Becket Fund for Religious Liberty, Washington, DC, for The Becket Fund for Religious Liberty, amicus curiae.

Dennis Rapps, The National Jewish Commission on Law and Public Affairs, New York City, for The National Jewish Commission on Law and Public Affairs, amicus curiae.

JUDGES: Before: Mikoll, J.P., Mercure, Peters, Spain and Carpinello, JJ.

OPINION: OPINION AND ORDER

Spain, J.

Appeal from an order of the Supreme Court (Teresi, J.), entered April 6, 1998 in Albany County, which granted plaintiffs' motion for summary judgment and declared the Laws of 1997 (ch 390) unconstitutional.

The legislation challenged in this action, chapter 390 of the Laws of 1997, is the most recent in a series of attempts by the Legislature to create a constitutionally valid educational program which meets the special education needs of the disabled students residing in the Village of Kiryas Joel, Orange County. The Village, which lies entirely within the boundaries of the Monroe-Woodbury Central School District, is a community established by members of the Satmar Hasidic sect. When created, the Village boundaries were drawn to include only property owned and inhabited by Satmars, devoutly religious people whose lifestyle is shaped by their religious beliefs. The facts of this case have been more fully described in prior State and US Supreme Court decisions (*see e.g.*, *Board of Educ. of Kiryas Joel Vil. School Dist. v. Grumet*, 512 U.S. 687, 129 L. Ed. 2d

546, 114 S. Ct. 2481 [hereinafter *Kiryas Joel I*]; *Grumet v. Cuomo*, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340 [hereinafter Kiryas Joel II]; *Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889, 527 N.E.2d 767).

At the core of this continuing controversy is a dispute over special education services between Monroe-Woodbury and the residents of the Village, whose children attend private religious schools within the Village. Because these parochial schools were not equipped to adequately educate the handicapped children of the Village, the Satmars initially relied on Monroe-Woodbury to provide these services and programs in an annex to one of the religious schools in the Village. After the US Supreme Court found such programs unconstitutional in *Aguilar v. Felton* (473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232) and *Grand Rapids School Dist. v. Ball* (473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3248), Monroe-Woodbury ceased offering on-site instruction. Thereafter, Monroe-Woodbury provided special education to the Village's handicapped children at its public school buildings located outside the Village. Eventually, most of the Village parents removed their children from the Monroe-Woodbury program because of, *inter alia*, the cultural and alleged emotional trauma experienced by these special needs children when exposed to the public school integrated classes (*see*, *Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, supra, at 181).

Ultimately, the Legislature attempted to end this conflict by enacting chapter 748 of the Laws of 1989 (hereinafter chapter 748), which provided for the creation of a union free school district coterminous with the Village, designated as the Kiryas Joel Village School District (*see*, L. 1989, ch. 748 [1]). The new school district ran only a special education program, providing services for approximately 40 disabled

children from the Village and over 150 additional Hasidic children residing in neighboring districts. All three levels of New York courts, *i.e.*, Supreme Court (Kahn, J.), this court and the Court of Appeals, found chapter 748 unconstitutional (*Grumet v. Board of Educ. of Kiryas Joel Vil. School Dist.*, 81 N.Y.2d 518, 601 N.Y.S.2d 61, 618 N.E.2d 94, *affg* 187 A.D.2d 16, *affg sub nom. Grumet v. New York State Educ Dept.*, 151 Misc. 2d 60, 579 N.Y.S.2d 1004). On appeal, the US Supreme Court affirmed, ruling that chapter 748 violated the Establishment Clause of the 1st Amendment to the US Constitution (*see*, *Kiryas Joel I, supra)*.

Thereafter, in response to the holding of the US Supreme Court, the Legislature passed chapter 241 of the Laws of 1994 (hereinafter chapter 241). Chapter 241 listed criteria related to, *inter alia*, enrollment and valuation by which municipalities were allowed to organize their own school districts (*see*, *Grumet v. Cuomo*, 225 A.D.2d 4, 8-9, 647 N.Y.S.2d 565, *affd.* 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340; *see also*, Education Law § 1504 [3], as added by L. 1994, ch. 241 [1]). Notably, chapter 241 was limited in application to municipalities already in existence (*see*, *Kiryas Joel II*, 90 N.Y.2d at 67). Although Supreme Court (Kahn, J.) found the new law constitutional, both this court and the Court of Appeals declared it unconstitutional (*see*, *id.*, at 68, *affg.* 225 A.D.2d 4). The Court of Appeals held that the statute's neutral language could not mask the fact that the law was so narrow that no other school district in the State could be established under its criteria (*see*, 90 N.Y.2d at 69).

In yet another effort to remedy the constitutional flaws of the prior legislation, the Legislature passed chapter 390 of the Laws of 1997 (hereinafter chapter 390). Chapter 390 is similar to its predecessor, chapter 241, but includes certain changes aimed at broadening its application. Unlike the prior statute, the new law allows municipalities yet to be formed,

which meet its criteria, to form new school districts and does not limit its immediate benefits to only one existing municipality. In August 1997, subsequent to the Governor's approval of the new statute, the Kiryas Joel Union Free School District was created.

Thereafter, claiming status as citizen taxpayers pursuant to the State Finance Law, plaintiffs commenced this action in Albany County against the Governor, the Education Department and its Commissioner, the State Board of Regents, the Comptroller, the District Superintendent of the Orange-Ulster BOCES (hereinafter collectively referred to as the State defendants) the Board of Education of the Kiryas Joel Union Free School District (hereinafter Kiryas Joel) and the Board of Education of Monroe-Woodbury. Plaintiffs challenged the constitutionality of chapter 390 under both Federal and State Constitutions. In October 1997, Kiryas Joel and Monroe-Woodbury moved for a change of venue from Albany County to Orange County. In December 1997, plaintiffs moved for summary judgment, claiming, inter alia, that out of 1,545 municipalities State-wide, only two villages qualified. Supreme Court denied the motion for a change of venue and, in a separate decision, granted summary judgment and declared that chapter 390 was unconstitutional. Kiryas Joel and Monroe-Woodbury appeal the denial of a change in venue. The State defendants, Kiryas Joel and Monroe-Woodbury appeal the grant of summary judgment.

We affirm. Initially, we conclude that Supreme Court did not err in denying the applications for a change of venue. It is settled law that "where there are conflicting venue provisions and one or more parties seeks a change of venue, it is given to the discretion of the court to select the proper venue" (*Matter of Hurst v. Board of Educ. for Ithaca City School Dist*, 242 A.D.2d 130, 132-133, 672 N.Y.S.2d 928; *see*, *Lawyers' Fund for Client Protection of State of N.Y. v.*

Gateway State Bank, 239 A.D.2d 826, 828, 658 N.Y.S.2d 705, *lv. dismissed* 91 N.Y.2d 848; *see also*, CPLR 502). In this case, there are conflicting CPLR provisions. Actions against school boards shall be brought in the county where the school district is located (CPLR 504 [2]); however, State Finance Law § 123-c (1) requires that a citizen taxpayer's challenge be brought either where the disbursement of funds occurred or is likely to occur or where the State official has his or her principal office. CPLR 509 states that venue, unless changed, shall be in the county chosen by the plaintiff. Here, five of the eight named defendants are State agencies or State officials with principal offices in Albany County, and plaintiffs, citizen-taxpayers challenging legislation which provides educational funding to school districts, chose Albany County. In light of the foregoing, Supreme Court did not abuse its discretion in denying a change of venue.

Moving next to the merits, we reject defendants' assertion that chapter 390 is a neutral law which cured the constitutional deficiencies of chapter 24 and conclude that, as did its predecessors, the new statute lacks the neutrality toward religion mandated by the Establishment Clause of the 1st Amendment to the US Constitution. It is well settled that government action must be neutral and cannot favor one religion over another nor favor a religious adherent over a nonadherent (*see*, *Kiryas Joel I*, 512 U.S. at 696; *Kiryas Joel II*, 90 N.Y.2d at 69; *Matter of Griffin v. Coughlin*, 88 N.Y.2d 674, 689-691, 649 N.Y.S.2d 903, 673 N.E.2d 98, *cert. denied*, 136 L. Ed. 2d 607, ___ U.S. ___, 117 S. Ct. 681; *see also*, US Const 1st, 14th Amends). "Equally well established is the principle that statutes of general applicability that extend their benefits without regard to religion honor the neutrality requirement and are generally beyond Establishment Clause reproach" (*Kiryas Joel II*, 90 N.Y.2d at 69). In *Kiryas Joel II*, the Court of Appeals clearly expressed its disapproval of the fact that chapter 241 was so

narrow that only the Village qualified for its benefits and that no other group could likely ever qualify (*id.*, at 73). Here, the record supports the conclusion that the new statute applies to only two of the State's 1,545 municipalities.[1] Thus, chapter 390 is hardly a "truly religious-neutral law of general applicability * * * [available to] a broad array of eligible municipalities" (*id.*, at 75).

We also reject defendants' assertion that chapter 390 satisfies the *Lemon* test (*see*, *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 29 L. Ed. 2d 745, 91 S. Ct. 2105). The second criterion of the *Lemon* test, also called the "effect" or the "endorsement" prong, requires an assessment of the "character of the institutions benefited" (*Agostini v. Felton*, 138 L. Ed. 2d 391, 521 U.S. 203, ___, 117 S. Ct. 1997, 2015; *see*, *Lemon v. Kurtzman, supra*, at 615). Under this prong, a statute will not pass Establishment Clause scrutiny if its "primary effect" is to advance or promote religion (*see*, *Lemon v. Kurtzman, supra*, at 612). A reviewing court must look at the context of the state action in assessing whether it is a government endorsement of religion (*see*, *Kiryas Joel I*, 512 U.S. at 699; *Kiryas Joel II*, 90 N.Y.2d at 75).

In the instant case, not only does the new statute apply to too few existing municipalities, its application to other municipalities in the future is speculative. Despite the provisions which extend the benefits of the statute to existing municipalities for which conditions may change in the future

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[1] We find merit in plaintiffs' argument that cities do not qualify for the benefits of chapter 390, a fact supported by one of defendants experts. Chapter 390 specifically states that it applies to "any municipality situated wholly within one central or union free school district" (L 1997, ch 390). Significantly, under the Education Law, school districts in cities with a population of less than 125,000 are small city school districts (Education Law § 2 [16]) and not central or union free districts.

and to new municipalities yet to be formed, the "theoretical possibility" that other municipalities may qualify under the new statute in the future is, in our view, remote at best (*see*, *Kiryas Joel II*, 90 N.Y.2d at 71). As to context, a review of the history of this legislation leads us to conclude that chapter 390, as its predecessors, clearly provides an impermissible preference to the Village in response to the Satmars' desire to provide their handicapped children with special education services in an exclusive Satmar environment. [2] Chapter 390, despite its facial neutrality, violates the second prong of the Lemon test as its primary effect endorses the Satmars' religious beliefs. [3]

It is significant that in a recent decision, *Agostini v. Felton, (supra)*, the US Supreme Court provides a constitutionally viable option for the defendants in this action. *Agostini* overruled *Aguilar v. Felton* (473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232, *supra*), the decision which caused Monroe-Woodbury to cease its on-site instruction of the special needs children of the Village. Consequently, Monroe-Woodbury, while not required to do so (*see, Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 189-190, 531 N.Y.S.2d 889, 527 N.E.2d 767, *supra*), is no longer precluded from simply going into the parochial schools in the Village and setting up satellite special education programs as it did prior to *Aguliar v.*

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[2] Notably, the new law is inconsistent with the expressed public policy in this State which favors consolidating school districts (especially small self-contained school districts), not creating new ones (*see, e.g.*, Education Law § 314).

[3] Supporting the conclusion that the new statute was intended to specifically benefit the Village is that the Assembly itself refers to chapter 390 as the "Kiryas Joel" bill (*see*, New York State Assembly's Session Highlights for 1997).

Felton (supra). Moreover, the fact that the underlying reason for the creation of the challenged school districts has now been eliminated also supports plaintiffs' assertion that chapter 390 should be perceived as yet another improper endorsement by the Legislature in providing the Satmar community the continued existence of a publicly funded exclusive environment in which to educate their children in accordance with their religious preferences (*see*, *Kiryas Joel I*, 512 U.S. at 699; *Kiryas Joel II*, 90 N.Y.2d at 75; *see also*, *Lynch v. Donnelly*, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S. Ct. 1355 [O'Connor, J., concurring]).

In summary, although the holdings in both *Kiryas Joel I* and *Kiryas Joel II* suggest that legislation achieving an "acceptable result" might be properly crafted, each of those cases concludes that such a school district must still be formed pursuant to a constitutionally permissible generally applicable law. In our view, chapter 390 does not encompass a sufficient number of municipalities to constitute the "broad array" suggested in *Kiryas Joel II (supra)*; like its predecessors, it is an "impermissible governmental endorsement of this religious community" (90 N.Y.2d at 64).

In view of the foregoing conclusions, we need not address plaintiffs' remaining contentions.

Accordingly, we affirm Supreme Court's grant of summary judgment in favor of plaintiffs.

ORDERED that the order is affirmed, without costs.

Mikoll, J.P., Mercure, Peters and Carpinello, JJ., concur.

APPENDIX C

DECISION AND ORDER APPEALED FROM

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 5648-97
RJI NO. 0197051323

GEORGE PATAKI, as Governor of the State of New York; THE NEW YORK STATE EDUCATION DEPARTMENT; RICHARD P. MILLS, as Commissioner of the New York Education Department; THE NEW YORK STATE BOARD OF REGENTS; H. CARL MCCALL, as New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT; THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT; and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Defendants.

Supreme Court Albany County All Purpose Term,
January 30, 1998
Assigned to Justice Joseph C. Teresi

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TERESI, J.:

Plaintiffs seek an order pursuant to CPLR 3212 granting summary judgment permanently restraining and enjoining defendants from taking any and all present future action or expending any State monies or resources for the purpose of implementing Chapter 390 of the Laws of 1997; that the defendant be ordered to take any and all action necessary to immediately close the Kiryas Joel Union Free School District and cease all operation of said district; that defendant Monroe-Woodbury Central School District take any and all action to provide special education services to the residents of the Village of Kiryas Joel, in accordance with Federal and State law; and for such other and further relief as the Court may deem just and proper.

Defendants oppose the motion.

This case results from the third attempt of the Legislature of this State to ignore the rulings from Courts at every level and to impermissibly endorse the Satmar community of Kiryas Joel. The relevant history of this case is fully recounted in *Grumet v. Board of Educ.*, 81 NY2d 518, *Board of Educ v. Weides*, 72 NY2d 174 and *Grumet v. Cuomo*, 90 NY2d 57. The Court of Appeals in *Grumet v. Cuomo*, 90 NY2d 57 (known as Kiryas Joel II) rebuffed the Legislature's second attempt to create this impermissible union of Church and State and the Legislature has now attempted this again. Chapter 390 of the Laws of 1997 purports to cure the errors in Chapter 241 (Chapter 390 predecessor struck down in *Grumet v. Cuomo*, 90 NY2d 57) by removing the objectionable factors specified in *Kiryas Joel II*.

In *Kiryas Joel II* the Court of Appeals stated that:

"In reviewing a law to determine whether it is truly religion-neutral and generally applicable, however, "[f]acial neutrality is not determinative. The Free Exercise Clause, like the *Establishment Clause*, extends beyond facial discrimination" (*Church of Lukumi Babalu Aue v. Hialeah*, 508 US 520, 534 [*emphasis added*] [*citing Gillette v. United States*, 401 US 437, 452 *("the Establishment Clause forbids subtle departures from neutrality")]*. Consequently, "[o]official action that targets religious conduct for distinctive treatment," whether that treatment is adverse or favorable "cannot be shielded by mere compliance with the requirement of facial neutrality" (*id.*, at 534). Moreover, just as "[t]he provision of benefits to [a] broad * * * spectrum of groups is an important index of secular effect" (*Widmar v. Vincent*, 454 US 263, 274, *see also, Westside Community Bd., of Educ. v. Mergens*, 496 US 226, 248 [plurality opn] [samel], the corollary of this proposition is also true; The provision of a governmental benefit to a restricted class, when that class is formed along religious lines, is a telling index of non-neutral sectarian effect (*see, Rosenberger v. Rector & Visitors of Univ. of Va.*, *supra*, *515 US*, at , 115 S Ct. at 2525 [O'Connor, J. concurring] ["Neutrality, *in both form and effect*, is one hallmark of the Establishment Clause"] [emphasis added]: *Walz v. Tax Commn.*, *supra*, *397* US, at 696 [Harlan, J., concurring] ["The Court must survey meticulously the circumstances of governmental categories to eliminate * * * religious garrymanders]). Consistent with these principles, the Supreme Court in *Kiryas Joel I* ruled the Chapter 748 violated the neutrality principle by solely benefiting a religious group, even though the law employed

> facially religion-neutral terms to create a school district coterminous with the duly incorporated Village of Kiryas Joel (512 US, at 702-705, *supra*)." *Kiryas Joel II* at 70.

The Court went on to quote that the Supreme Court in *Capital Sq. Review & Advisory Bd v. Pinette, supra*, 515 US at ___, 115 S Ct at 2454:

> "The Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions"]). Given the unrebutted record."

Defendants urge that the fact that Chapter 390 of the Laws of 1997 cures the infirmities of Chapter 241 by eliminating the two (2) qualifications found offensive in *Grumet v. Cuomo*, 90 NY2d 57 at 72. However, when applying the "Lemon" test as found in *Lemon v. Kurtzman*, 403 US 602, the Court focused on the second prong, identifying the central question to be answered as whether:

> "The challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices" (*Grand Rapids School Dist. v. Ball, 473 US 373, 390, supra*). This concept of "endorsement" is alternatively expressed as "favoritism," "promotion," or "preference" (*see, Allegheny County v. Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 593* [citing cases]), but the principle is constant: "whatever else the Establishment Clause may mean * * , it certainly means at the very least that government may not

demonstrate a preference for one particular sect or creed" (*id., at 605*). *Kiryas Joel II* at 74.

The Court went on to state:

"Two aspects of the endorsement inquiry are a particularly relevant in this case. First, as is evident from the very terms of *Lemon's* second prong, the actual effect of the challenged State actio, and not merely its stated purpose, is a proper subject of Establishment Clause scrutiny **(see, id., at 592** ["we have paid particularly close attention to whether the challenged governmental practice either has the purpose of *effect* of 'endorsing' religion"] [emphasis added]). "[E]ven when the challenged statute appears to be neutral on its fact," the Supreme Court has "always been careful to ensure that" the challenged State action "does not have the primary effect of advancing religion" (*Bowen v. Kendrick, 487 US 589, 609, supra; see, Grand Rapids School Dist. v. Ball, supra, 473 US, at 389-392* [invalidating State-funded educational program because of its "endorsement" effect, where 40 of the 41 beneficiaries were religious schools]; *cf., Texas Monthly v. Bullock, 489 US 1, 17* [plurality opn] [invalidating tax exemption limited to religious periodicals because it "effectively endorses religious belief"]).*

In addition, the endorsement inquiry is not conducted by analyzing the challenged governmental action in isolation. Rather, a court must take into account the context in which the State has acted. "Context determines whether particular governmental action is likely to be perceived as an endorsement of religion" (*New York State School Bds. Assn., v. Sobol, 79 NY2d 333, 339, cert. denied 506 US 909; Grumet v. Board of Educ., 81 NY2d 518, 528, affd 512 US*

> *687; supra; see, Allegheny County v. Greater Pittsburgh Am. Civ. Liberties Union, supra, 492 US, at 598-601* [analyzing physical and temporal context of creche display]; *Lynch v. Donnelly, 465 US 668, 679* ["the focus of our inquiry must be on the creche in the context of the Christmas season"]; *cf., Kiryas Joel I, supra, 512 US, at 699* [plurality opn] ["analysis does not end with the text of the statute at issue." but must take into account its "context"]). *Kiryas Joel II* at 74, 75.

The Court of Appeals then considered the context of Chapter 241 and found:

> "Applying the foregoing principles to this case, we conclude that the enactment of chapter 241 would be perceived as an act of governmental favor for the sole benefit of the Satmar sect. Chapter 241 was enacted into law after the Supreme Court issued its decision in *Kiryas Joel I* striking down Chapter 748 as an act of legislative favoritism. Defendants acknowledge that Chapter 241 was adopted in direct response to the *Kiryas Joel I* ruling to provide the Village of Kiryas Joel with an alternative mechanism to secure its own school district. Indeed, Chapter 279, a companion statute to Chapter 241, expressly authorizes the district's continued operation and specifically contemplates that a Kiryas Joel School District will be reconstituted pursuant to Education Law article 31." *Kiryas Joel II* at 75.

Applying these sound principles to this case, results in the same conclusion. There is no doubt that Chapter 390 was enacted into law as a response to the Court of Appeals striking down Chapter 241, as an act of legislative favoritism. A cursory review of the legislative debates

confirms that primary justification for the passage of Chapter 390 is the resurrection of the Kiryas Joel School District. A review of this record and the statistics placed before the Court lead to the conclusion that Chapter 390 as applied only definitively applies to two municipalities. Defendants protestations of possible future municipalities qualifying at some later point was addressed and rejected in *Kiryas Joel II* at 71. This Court rejects the creative boot-strap reasoning that the broadening of Chapter 241 by Chapter 390 by adding one municipality does not qualify as the "broad array of eligible municipalities", envisioned by the Court of Appeals in *Kiryas Joel II* at 75.

This Court finds that Chapter 390 violates the Establishment Clause of the First Amendment of the United States Constitution. Although, neutral and generally applicable on its face, there can be no doubt that Chapter 390 is a clear, unequivocal, but impermissible favoritism, promotion, preference and endorsement by the State of the Satmar community of Kiryas Joel.

As previously held by the Court of Appeals: "... context determines whether particular governmental action is likely to be perceived as an endorsement of religion". (*Kiryas Joel II* at 75) Viewed in the context of its history and effect, the inappropriate endorsement of a specific religion is the prominent message evoked by Chapter 390. A full review of this record indicates that the purpose of Chapter 390 was to confer a benefit on the religious community of Kiryas Joel and to the cost of more then three million ($3,000,000) dollars, with the New York Taxpayers assuming those costs.

Plaintiff's motion for summary judgment is granted. Chapter 390 is found to be unconstitutional and defendants are permanently enjoined and restrained from taking any and all present, future action or expending any State monies or

resources for the purpose of implementing Chapter 390 of the Laws of 1997. The defendants are ordered to take any and all action necessary to immediately close the Kiryas Joel Union Free School District and cease all operation of said district. The defendant Monroe-Woodbury Central School District is ordered to take any and all action to provide special education services to the residents of the Village of Kiryas Joel, in accordance with Federal and State law.

All papers, including this Decision and Order, are being returned to the attorneys for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: Albany, New York
April 2, 1998

/s/
Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

(1) Notice of Motion dated December 19, 1997.
(2) Affidavit in Support of Motion for Summary Judgment of Jay Worona, Esq. dated December 19, 1997, with Attached Exhibits A – F.
(3) Affidavit in Support of Motion for Summary Judgment of Daniel Kinley dated December 17, 1997, with Attached Exhibits A – H.

(4) Summons dated September 11, 1997 with Complaint dated September 9, 1997, with Attached Exhibits A – HH.

(5) Affidavit in Support of Motion for Summary Judgment of Louis Grumet dated December 18, 1997, with Attached Exhibits A and B.

(6) Affidavit in Support of Motion for Summary Judgment of J.Francis O'Connor dated December 16, 1997, with Attached Exhibit A.

(7) Affidavit in Support of Motion for Summary Judgment of Caroline C. Shipley, dated December 16, 1997.

(8) Affirmation in Opposition to Plaintiffs' Motion for Summary Judgment by Nathan Lewin, Esq. dated January 16, 1998.

(9) Affidavit of Edward C. Farrell dated January 13, 1998.

(10) Affirmation of Donald G. Nichol, Esq. dated January 13, 1998.

(11) Affidavit in Opposition to Plaintiffs' Motion for Summary Judgment of Basil A. Imburgia dated January 15, 1998, with Attached Exhibits 1 – 11 and A – H.

(12) Affirmation of Mary Ellen Clerkin, A.A.G. dated January 16, 1998.

(13) Affidavit of Lawrence W. Reich, Esq. dated January 8, 1998, with Attached Exhibits A- D.

(14) Reply Affidavit of J.Francis O'Connor dated January 27, 1998.

(15) Reply Affidavit of Daniel Kinley dated January 30, 1998, with Attached Exhibit A.

(16) Reply Affidavit of Jay Worona, Esq. dated January 30, 1998, with Attached Exhibits A – C.

Supreme Court, U.S.
FILED
JUN 29 1999
CLERK

No. 98-1932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE PATAKI, *et al.*

Petitioners

v.

LOUIS GRUMET and CAROLINE C. SHIPLEY,

Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI*

Pursuant to Rule 37.3 of this Court,[1] The Becket Fund

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[1]All parties have consented to the filing of this brief. The letters of consent from the Petitioners and Respondents have been filed

(continued...)

respectfully submits this brief *amici curiae* in support of Petitioners. The Becket Fund for Religious Liberty is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions, including the ability of religious people and institutions to participate fully in public life. The Becket Fund engages in litigation in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

The Catholic League is the largest Catholic civil rights organization in America. Founded in 1973, the Catholic League defends the right of Catholics to participate in American public life without defamation or discrimination.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A."), founded in 1898, is the largest Orthodox Jewish umbrella organization in the United States. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the traditional Jewish community. The U.O.J.C.A. regularly files or joins in friend of the court briefs in cases that impact upon religious freedom in federal and state courts of all levels.

Amici believe that Chapter 390 of the Laws of 1997 accommodates the special educational needs of the children of Kiryas Joel in a manner that conforms to the constitutional requirements laid out in *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

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[1](...continued)
simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals struck down Chapter 390 in part because it thought the statute had an invalid "origin." Pet. App. A at 20a. That "origin" was the fact that Chapter 390 was intended to accomplish the same goals of an earlier statute invalidated in *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994)–the accommodation of the special educational needs of children living in Kiryas Joel. The Court of Appeals gave short shrift to the fact that Chapter 390, unlike its predecessor, accomplishes this goal through a generally applicable statute that does not make distinctions based on religion, either facially or otherwise.[2]

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[2]The Court of Appeals admitted that Section 390 sets forth facially neutral criteria for allowing creation of new school districts. Pet. App. A at 11a. Moreover, the Court of Appeals did not question the validity of the policy justifications behind the individual criteria, which focus on the number of children in the new school district, the new district's impact on enrollment in the existing school district, and the new district's funding implications. *See* Pet. App. A at 8a. As the dissent noted, "the recognized population and wealth criteria are the typical factors used in effective legislation." Pet. App. A. at 28a. None of the criteria are intended to draw lines that include communities of Satmar Hasidim and exclude other similarly situated communities. Two municipalities currently meet the criteria for forming a school district set forth in Chapter 390, Pet. App. A at 11a, and there are ten identified geographical areas that would immediately be eligible if they chose to incorporate. Pet. at 13 n.1. Moreover, the criteria are laid out in general terms that could apply to numerous other areas in the future. Chapter 390 is thus characterized by "neutrality as among

(continued...)

Rather, as an important part of its analysis, the Court of Appeals focused its gaze on the fact that Chapter 390 was enacted in the aftermath of the earlier statutes' demise. Pet. App. A at 18a. This holding conflicts with the precedents of this Court and Establishment Clause decisions in the lower courts, most recently the United States Court of Appeals for the Third Circuit in *ACLU-N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999).

A. The Court of Appeals' Decision Conflicts with this Court's Teaching on the Nature of Judicial Review

The lower court's reliance on the origin of the statute, that is, the history of the legislature's attempts to accommodate the special educational needs of the children of Kiryas Joel, conflicts with the very nature of judicial review. Underlying the New York Court of Appeal's decision below, so obvious as to go without need of citation, is *Marbury v. Madison*, 5 U.S. 137 (1803). *Marbury* firmly established the principle that the Constitution is the supreme law of the land and began the concept of judicial review of acts of legislatures. But *Marbury* did more than that. It set in motion a process of dialogue between the courts and the legislatures, in which the courts guard the constitutional limits of permissible legislation, and the legislatures strive to act within those boundaries, all in pursuit of the common goal of

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[2](...continued)
religions," *see Kiryas Joel I*, 512 U.S. at 707, is "a generally applicable scheme" that "set[s] forth neutral criteria that a village must meet to have a school district of its own," *id.* at 717 (O'Connor, J., concurring), and is a religion-neutral statute that does not "use religion as a line-drawing criterion." *Id.* at 728 (Kennedy, J., concurring).

just and effective governance.

As Justice Jackson famously explained, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Or as Justice Ginsburg has observed, "[The judiciary does] not alone shape legal doctrine . . . but they participate in a dialogue with other organs of government, and with the people as well." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

These principles have particular force in the area of judicial review of the constitutionality of statutes. Legislatures frequently look to a court decision striking down a statute, and craft a new statute aimed at fulfilling the legislative purpose of the original, now-invalidated statute, but in a manner that complies with the Constitution. As one commentator explained:

> If [the actions of the political branches] are challenged in the judicial arena, courts may affirm or invalidate, but even in the latter case the colloquy between the branches continues. Congress can rewrite the statute, preparing it for another round of litigation, or may decide to present essentially the same statute in later years to a court with a changed composition. At times the judiciary invites Congress to pass legislation that challenges previous decisions.

LOUIS FISHER, CONSTITUTIONAL DIALOGUES:

INTERPRETATION AS POLITICAL PROCESS 8 (1988).

One notable example is the policy enacted by New York City in response to *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court struck down the City of New York's practice of providing remedial services to children in parochial schools by sending public school teachers into parochial schools. Subsequently, the City of New York, acting on a suggestion in Justice O'Connor's dissent in *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting), adopted an alternative plan for providing services which included teaching the children in vans just off school grounds. *See Agostini v. Felton*, 117 S. Ct. 1997, 2005 (1997). New York City thus crafted a way to continue to pursue its goal of providing remedial services to parochial school students by altering its policies to comply with the *Aguilar* decision. Indeed, one could even argue that the City altered its policy just enough to skirt the *Aguilar* decision, moving the site of instruction just off the grounds of the parochial schools. Such tailoring of policy to comply with court rulings is in our best traditions of constitutional cooperation between the legislative branch and the courts. But under the Court of Appeals of New York's reasoning below, New York's "*Aguilar*" trailer should have been viewed as a highly suspect program of evasion. The "origins" of the trailer policy–the previous policy and the *Aguilar* lawsuit–should have tainted it, according to the reasoning of the New York Court of Appeals.

Another noteworthy example of the colloquy between the courts and legislature is abortion. After this Court struck down portions of the abortion laws of Georgia and Texas in *Roe v. Wade*, 410 U.S. 113 (1973), numerous states enacted a wide range of provisions relating to the procedure, some of which were upheld, and some of which were struck down. *Compare Webster v. Reproductive Health Services*, 492 U.S.

490 (1989) (upholding viability-testing requirement before performing an abortion on a fetus of twenty or more weeks of gestational age) *with Colautti v. Franklin*, 439 U.S. 379, 381 n.1 (1979) (striking down as unconstitutionally vague Pennsylvania law requiring doctor to determine "based on his experience, judgment or professional competence" if there was "sufficient reason to believe the fetus may be viable"). These measures enacted by states stood or fell based on the Court's substantive judgments. They did not stand or fall based on whether or not they were drafted to fall just within the limits of *Roe*. They all plainly were.

This Court's rulings on death penalty statutes similarly reflect a judicial-legislative colloquy. In response to *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, at least 35 states enacted new death-penalty statutes in an attempt to pursue their penological objectives in a manner consistent with the Court's ruling in *Furman*. *See Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976). Reviewing these new statutes, this Court found some to have corrected the flaws identified in *Furman*. *See, e.g.*, *Gregg*, 428 U.S. at 196-206 (plurality) (upholding Georgia statute); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (plurality) (upholding Florida statute). Others that had not brought their statutes into compliance with the Constitution were struck down. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality). In the case of *Woodson* and *Roberts*, the process of the Court defining limits and the legislature responding continued: North Carolina and Louisiana both subsequently enacted yet another generation of capital punishment statutes in response to those decisions. *See Coker v. Georgia*, 433 U.S. 584, 594 (1977).

No one seriously suggests that states could not continue

to enact death penalty statutes because their earlier attempts exceeded constitutional boundaries. Yet that, in essence, is the remarkable position taken by the lower court in this case with respect to the Establishment Clause when it invalidated Chapter 390 in part because of its "origin." This is all the more troubling because the precise contours of the Establishment Clause are at least as difficult to discern as the contours of the Eighth Amendment at the time of *Furman*. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("our Establishment Clause jurisprudence is in hopeless disarray"). The lower court's idiosyncratic conception of judicial review is one this Court should not tolerate.

B. The Decision Below Conflicts with a Recent Decision of the Third Circuit.

If allowed to stand, the decision below threatens mischief in the lower courts. Its once-unconstitutional-always-unconstitutional logic is squarely in conflict with a recent decision of the Third Circuit, *ACLU-N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) ("*Schundler II*"), as well as a decision of the Seventh Circuit.

In *Schundler II*, the Third Circuit evaluated the constitutionality of a holiday display containing religious and secular elements that was erected after a prior holiday display had been ruled unconstitutional. *See ACLU-N.J. v. Schundler* 104 F.3d 1435 (3d Cir. 1997) (*Schundler I*). In upholding the display, the *Schundler II* Court specifically rejected the argument that the revised display was an attempt at evasion. Writing for the court, Judge Alito observed:

> [T]he Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith.

168 F.3d at 105. *Cf. Bear Lodge Multiple Use Association v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998) (upholding policies by the National Park Service to accommodate access of Native Americans worshipers to Devil's Tower National Park that were adopted by the Park Service after the court had struck down similar accommodations as violating the Establishment Clause), *aff'd*, No. 98-8021 (10th Cir. Apr. 26, 1999).

Similarly, in *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir.), *reh'g denied*, 869 F.2d 356 (1989), the Seventh Circuit upheld the display of a creche in front of a village hall that had various secular seasonal symbols added "after questions had been raised about the propriety of displaying a creche on public property." *Id.* at 1292. Following *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld the display, holding that "[t]he point of *Lynch* . . . is that the context–the context of the ensemble, and more important the context of the secular holiday the government observes–is the controlling consideration." *Id.* at 1293. In short, the court focused solely on the revised display, and did not think it untoward that any changes had been made to comply with constitutional requirements.

Thus the lower federal courts have recognized that it is a natural part of our constitutional democracy that government

actors frequently revise the means by which they pursue their goals in response to direction from the courts. Such a process was the "origin" of Chapter 390. The Court of Appeals erred in holding that this "origin" tainted the legislation. Pet. App. A at 20a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 98-1932

In The

Supreme Court of the United States

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the New York Court of Appeals subverted this Court's decisions in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) and *Agostini v. Felton*, 521 U.S. 203 (1997) when it invalidated a state statute which allowed a religious community to obtain its own public school district but which did not provide that benefit to the religious community as one of many eligible communities for equal treatment.

LIST OF PARTIES

The parties to the proceeding below were:

Louis Grumet,
Caroline C. Shipley,

Plaintiffs-Respondents,

George Pataki, as Governor of the State of New York,
The New York State Education Department,
Richard P. Mills, as Commissioner of the New York State Education Department,
The New York State Board of Regents,
H. Carl McCall, as New York State Comptroller,
The Board of Education of the Kiryas Joel Union Free School District,
The Board of Education of the Monroe-Woodbury Central School District,
Dr. William J. Bassett, Jr., as District Superintendent of the Orange-Ulster BOCES,

Defendants-Appellants.

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JURISDICTION

This Court's jurisdiction is discretionary under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "

Section 1504 of the New York State Education Law as amended by Chapter 390 of the Laws of 1997, provides, in relevant part that:

> 3. Any municipality situated wholly within one central or union free school district but whose boundaries are not coterminous with the boundaries of such school district may organize, pursuant to the provisions of this subdivision, a new union free school district consisting of the entire territory of such municipality whenever required by the educational interests of the community.
>
> a. No such new school district may be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have an actual valuation per total wealth pupil unit at least equal to the statewide average; and (iii) the

> enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality.
>
> g. For the purposes of this subdivision, the term "municipality" shall mean a city, town, or village . . .

Section 1504 of the New York State Education Law, as amended by Chapter 241 of the Laws of 1994, (the precursor to Chapter 390 of the Laws of 1997), provided in relevant part that:

> 3. Any municipality situated wholly within a single central or union free school district, but whose boundaries are not coterminous with the boundaries of such school district, may organize a new union free school district, pursuant to the provisions of this subdivision, consisting of the entire territory of such municipality, whenever the educational interests of the community require it.
>
> a. No such new school district shall be organized unless: (i) the enrollment of the municipality seeking to organize such new school district equals at least two thousand children, and is no greater than sixty percent of the enrollment of the existing school district from which such new school district will be organized; (ii) such new school district would have actual valuation per total wealth pupil unit at least equal to the statewide average; (iii) the enrollment of the existing school district from which such new school district will be organized equals at least two thousand children, excluding the residents of such municipality; and (iv) the actual valuation per total wealth

pupil unit of such existing school district will not increase or decrease by more than ten percent following the organization of the new school district by such municipality.

g. For the purposes of this subdivision, the term "municipality" shall mean a city, town or village in existence as of the effective date of this subdivision . . .

COUNTERSTATEMENT OF THE CASE

This case involves the Satmar Hasidic religious community of the Village of Kiryas Joel ("the Village"), located in Orange County, New York, and the constitutional validity of New York State's most recent effort to afford that community its own separate public school district. At issue is not the question of whether government may accommodate the religious needs and/or preferences of its citizens. Nor is it at issue the manner in which the Petitioner Board of Education of the Kiryas Joel Union Free School District operates a public school district. Instead, the case concerns strictly whether New York State's latest effort to accommodate the religious preferences of the Village residents for a separate public school district conforms with this Court's previous decisions in *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994),[1] and *Agostini v. Felton*, 521 U.S. 203 (1997).

[1] In the past, the residents of the Village of Kiryas Joel have maintained that they "prefer to live together 'to facilitate individual religious observance and maintain social, cultural and religious values' " and that their religious precepts do not

General Background

The early history of this case is well documented in this Court's decision in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra.* Briefly, the Village is a municipality inhabited by members of a single religious group whose children are educated in private religious schools where they receive instruction in their religious way of life, and their exposure to secular subjects is limited. (*Id.*, at 690-91). However, the Village's private religious schools do not offer special education services for children with disabilities. (*Id.*, at 692).

Prior to this Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Village children with disabilities received special education services from Petitioner Board of Education of the Monroe-Woodbury Central School District ("Monroe-Woodbury"), which provided those services at an annex to one of the Village's religious schools. (512 U.S. at 692). However, following the *Aguilar* decision Monroe-Woodbury ended the arrangement, and the Village residents found it unsatisfactory having to send their children to Monroe-Woodbury's public schools. (*Id.*; *Board of Educ. of the Monroe-Woodbury Central School Dist. v. Wieder*, 72 N.Y. 2d 174 (1988)). The present

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preclude them from interacting with others. (*Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra*, at 706, n.9). It is the "trauma" suffered by their children in the presence of others who are different from them, instead of "religious practice or doctrine" which allegedly drives their desire for a separate school district. (*Id.*, at 692-693; *Board of Educ. of the Monroe-Woodbury Central School Dist. v. Wieder*, 72 N.Y. 2d 174, 180-181 (1988)).

case involves New York State's third attempt to provide the Village with its own public school district.

The First Attempt to Provide the Village with a Separate School District

New York State's first attempt to provide the Village its own public school district was the subject of this Court's review in *Kiryas Joel*. A majority of this Court invalidated Chapter 748 of the Laws of 1989[2] because there was " . . . no assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703). However, that determination was based specifically on the fact that "the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law". (*Id.*). The concern of the *Kiryas Joel* majority was further echoed in the concurring opinions of Justice O'Connor and Justice Kennedy, both of whom indicated that it would be appropriate for New York State to afford the Village its own public school district under "generally applicable legislation" which is "religion-neutral". (512 U.S. at 716-17 (O'Connor, J., concurring); 512 U.S. at 728-30 (Kennedy, J., concurring)).

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[2] Chapter 748 of the Laws of 1989 provided, in relevant part, that "[t]he territory of the village of Kiryas Joel . . . shall be and hereby is constituted as a separate school district, and shall be known as the Kiryas Joel village school district and shall have all the powers and duties of a union free school district under the provisions of the education law."

The Second Attempt to Provide the Village with a Separate School District

In response to this Court's *Kiryas Joel* decision, the New York State Legislature and its Governor enacted into law Chapter 241 of the Laws of 1994 ("Chapter 241"). Although the trial court found Chapter 241 to be constitutionally valid, (*Grumet v. Cuomo*, 164 Misc.2d 644 (1995)), two state appellate courts, including the New York Court of Appeals disagreed. (*Grumet v. Cuomo*, 225 A.D.2d 4 (3d Dep't 1996); 90 N.Y. 2d 57 (1997)).

In its *Grumet v. Cuomo* decision, the New York Court of Appeals expressly acknowledged that it was permissible for the New York State Legislature to attempt to cure the constitutional infirmity identified by this Court in *Kiryas Joel* and explained that:

> the Legislature might have achieved a constitutionally acceptable result had it enacted a truly religion neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of eligible municipalities, might have invoked. Instead, . . . the Legislature's attempt to remedy chapter 748 through the enactment of chapter 241 produced a law whose actual effect confers a benefit on the religious community of Kiryas Joel alone and for all practical purposes effectively replicates the prior unconstitutional law. (90 N.Y. 2d at 75).

The *Grumet v. Cuomo* decisions and the Record therein indicate that there are over 1,500 municipalities in New York State. However, the Village was the only one able to meet the qualifications required by Chapter 241.

(90 N.Y. 2d at 73; 225 A.D.2d at 9). Indeed, contemporaneous media reports quoted the spokesperson for the statute's legislative sponsor as stating that " '[t]he trick for negotiators [was] to craft legislation so Kiryas Joel would be virtually the only village to take advantage of the opportunity to create a district – even though others technically could.' " (225 A.D.2d at 9).

The New York Court of Appeals found most problematic the limitation restricting the statute's applicability to municipalities in existence at the time of its enactment because it "cut off any group, religious or nonreligious . . . that lacked the foresight to incorporate as a village before the enactment of the statute . . . " (90 N.Y. 2d at 72-73). Similarly, it also questioned the criteria which required that a school district created under Chapter 241 not cause the per pupil wealth of the preexisting district to increase by more than 10% because "there assuredly would be no sound reason to protect a district from a wealth increase." (*Id.*, at 72). Nonetheless, the New York Court of Appeals characterized Chapter 241's qualifying criteria as "perhaps well-intentioned and not entirely devoid of secular justification." (90 N.Y. 2d at 73). The constitutional problem arose because the criteria were "drawn in such a way that 'the benefit flow[ed] only to a single sect.' " (90 N.Y. 2d at 73, citing *Kiryas Joel*, 512 U.S. at 705).

According to the New York Court of Appeals, Chapter 241:

> [i]n its actual effect, . . . operate[d] not as a generally applicable, religion-neutral law, but ha[d] the same nonneutral effect of singling out Kiryas Joel for special treatment that caused this

> Court and the Supreme Court to strike down chapter 748 of the Laws of 1989 in *Kiryas Joel I*: '[T]he religious community of Kiryas Joel did not receive its governmental authority simply as one of many communities eligible for equal treatment under a [truly] general law.' (*Id.*, citing *Kiryas Joel*, 512 U.S. at 703).

Consequently, the statute was found to violate "the Establishment Clause neutrality principles that form the core holding of *Kiryas Joel I* and, for essentially the same reasons . . . conveys an endorsement of the Satmar religion." (90 N.Y. 2d at 69). As set forth at page 11 of the Petition for Writ of Certiorari, no review was sought from this Court regarding the New York Court of Appeals decision in *Grumet v. Cuomo*.

The Third and Most Recent Attempt to Provide the Village with a Separate School District

Subsequent to the New York Court of Appeals' decision in *Grumet v. Cuomo, supra*, and as set forth in the papers recently submitted to this Court by the Respondents in Opposition to the Petitioners' Request for a Stay, Petitioner Richard P. Mills, as Commissioner of the New York State Department of Education, issued several orders pursuant to which the Village children who had attended the Kiryas Joel School District were to once again receive special education services from Monroe-Woodbury. However, during the transitional period for the transfer of responsibilities to Monroe-Woodbury, New York State adopted Chapter 390 of the Laws of 1997 ("Chapter 390"), which allowed the Village to reconstitute a school district of its own.

It is Chapter 390 which is at issue in the Petition for Writ of Certiorari herein. The statute's qualifying criteria are identical to those of its predecessor, Chapter 241, with two exceptions. First, Chapter 390 eliminated the previous limitation restricting the statute's applicability to municipalities in existence at the time of its enactment. Second, it also eliminated the criteria which had required that the actual valuation per total wealth pupil unit of the existing school district not increase or decrease by more than 10%. However, the elimination of this criteria allowed only one other existing municipality, in addition to the Village, to qualify for benefits of Chapter 390.

The Petitioners represent at pages 11-12 of the Petition that Chapter 390 "was not designed solely to apply to Kiryas Joel . . . " In support of their contention they refer this Court to Governor George Pataki's approval memorandum which they state "declared . . . that 10 of the state's municipalities (including Kiryas Joel) would be immediately eligible to form school districts under the legislation" as well as, in a footnote at page 13 of the Petition, to affidavits submitted by the Board of Education of the Kiryas Joel School District "attesting that ten municipalities would immediately be able to form school districts under the law if they incorporated." However, as the New York Court of Appeals observed in the decision below, the Petitioners failed to show any additional eligible municipalities. (Pet. App. A, at 11a n.7). Moreover, as the Record below indicates, the affidavits submitted by experts on behalf of the Kiryas Joel School District and the State Petitioners confirm that Chapter 390 applies to only two municipalities in the entire State of New York.

As the Record below indicates, affidavits submitted by counsel for the Board of Education of the Kiryas Joel School District and counsel for Monroe-Woodbury attesting that certain cities and unincorporated communities are eligible or potentially eligible under Chapter 390's qualifying criteria lacked probative value for two reasons. First, they ignored the clear language of the statute that Chapter 390 does not apply to cities because even though the statute defines "municipality" to include "a city, town or village", it also requires that a qualifying municipality be wholly contained in a central or union free school district. However, under the New York State Education Law, school districts in cities with a population of less than 125,000 inhabitants are small city school districts, (N.Y. Educ. L. § 2501), and school districts in cities with a population of more than 125,000 inhabitants, which include the cities of New York, Buffalo, Rochester, Syracuse and Yonkers, are large city school districts, (N.Y. Educ. L. §§ 2550, 2551), instead of central or union free. Indeed, the State Petitioners conceded as much in their opposition to Respondents' motion for a preliminary injunction to stay the implementation of Chapter 390, and the expert for the Kiryas Joel School District attested that he considered cities in his analysis of the statute because he was "directed to consider cities" by the law firm which retained his services.

Second, the expert for the Kiryas Joel School District also attested that there were certain areas identified by the United States Census Bureau as Census Designated Places ("CDPs") which are not presently incorporated but would qualify under the statute if they were. However, he also conceded that "there is no specific data available regarding the school valuation or municipal enrollment

of CDPs" and that he admittedly manufactured his own data on CDPs to determine eligibility under the statute's criteria requiring that the new school district have an actual valuation per total wealth pupil unit which is at least equal to the statewide average.

It was upon consideration of "both the form and the effect" of the statute that the New York Court of Appeals, in the decision below, determined that:

> [a]lthough Chapter 390 sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect . . . In practical effect . . . the religious community of Kiryas Joel is not 'merely one in a series of many communities' eligible for equal treatment under Chapter 390's special school district laws." (Pet. App. A, at 11a (citations omitted)).

In so ruling, the New York Court of Appeals acknowledged that Chapter 390 eliminated the two qualifying criteria of Chapter 241 it had questioned in *Grumet v. Cuomo*, 90 N.Y. 2d at 72-73. However, notwithstanding the representations by Petitioners at page 11 of the Petition for Writ of Certiorari, the New York Court of Appeals also made clear that in its *Grumet v. Cuomo* decision it had not suggested that "the mere deletion of those [two] defective provisions would render the statute constitutional." (Pet. App. A, at 13a n.9). Instead, it had observed that to obtain a constitutionally permissible result, the Legislature needs to enact "a truly religion-neutral law of general applicability that the Village of Kiryas Joel, as one in a broad array of general municipalities, might . . . invoke[ ]." (*Id.*).

Thus, the New York Court of Appeals determined that although Chapter 390 eliminated the two qualifying criteria questioned in *Grumet v. Cuomo*, the statute's "eligibility requirements . . . are still limited in such a way that permits the statute's benefits to flow almost exclusively to . . . [Kiryas Joel]." (Pet. App. A, at 12a-13a). According to the New York Court of Appeals, "it does not follow that Chapter 390 – by allowing one additional municipality to qualify under the statute – is a general, religion-neutral law." (Pet. App. A, at 12a).

Moreover, the New York Court of Appeals expressly stated that contrary to the view expressed by the dissent below, (referenced by Petitioners at page 13 of the Petition for Writ of Certiorari), its decision did not stand for the proposition that "statutes that do not apply to a sufficiently broad spectrum of religious groups will automatically be considered unconstitutional . . . " (Pet. App. A, at 19a n.11). It explained, however, that this Court's Establishment Clause jurisprudence, including the *Agostini* decision, 521 U.S. 203, *supra*, allows for consideration of "whether a challenged State action benefits a broad spectrum of groups" when assessing the secular effect of government action. (Pet. App. A, at 11a n.8).

REASONS FOR DENYING THE WRIT

I.

The Decision Of The New York Court Of Appeals Does Not Subvert This Court's Rulings in *Kiryas Joel* And *Agostini v. Felton.*

A. Religious Accommodation.

Contrary to the representations by Petitioners at pages 14-16 of the Petition for Writ of Certiorari, the New York Court of Appeals did not subvert the Establishment Clause accommodation principles which underscored the decision of a majority of this Court in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet, supra.*

In *Kiryas Joel*, a majority of this Court explained that " 'government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause.' " (512 U.S. at 705-706 (citations omitted)). However, "accommodation is not a principle without limits . . . " (*Id.*, at 706). Thus, the *Kiryas Joel* majority invalidated Chapter 748 of the Laws of 1989 not because it "facilitate[d] the practice of religion" but because the "proposed accommodation single[d] out a particular religious sect for special treatment . . . and whatever the limits of permissible legislative accommodations may be . . . it is clear that neutrality as among religions must be honored." (*Id.*, at 706-707).

According to the *Kiryas Joel* majority, the method chosen by the New York Legislature to accommodate the Satmar community was "one that aid[ed] a particular religious community, . . . rather than all groups similarly interested in separate schooling." (512 U.S. at 708). The validity of the statute would have been upheld if it had

allowed the Village to obtain a public school district "simply as one of many communities eligible for equal treatment under a general law," (*Id.*, at 703; *see also*, 512 U.S. 687, 716-17 (O'Connor, J. concurring); 512 U.S. 687, 728-30 (Kennedy, J., concurring)), thus providing "assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703).

Similarly, the New York Court of Appeals ruled that Chapter 390 constitutes an unconstitutional accommodation of religion. (Pet. App. A, at 13a-20a). However, the Petitioners take exception to this ruling at page 16 of the Petition for Writ of Certiorari stating that:

> The majority in the Court of Appeals ignored [the *Kiryas Joel*] principles of accommodation when it invalidated Chapter 390 as having the primary effect of advancing or preferring one religion over others. The majority concluded that because only two municipalities (one of which is not a religious community) currently qualify under the generally applicable scheme of Chapter 390 to form school districts, and because the statute was an extension of past attempts to accommodate the Satmar community in particular, 'the secular effect of the statute is virtually indiscernible' . . . This view that a neutral statute must fail because it reflects a legislative intent to assist the Satmar community turns this Court's Establishment Clause jurisprudence upside down.

Contrary to the Petitioners' representations, the New York Court of Appeals decision made clear that it was not

the fact "[t]hat Chapter 390 was designed to accommodate the needs of the religious community of Kiryas Joel . . . [which] renders it unconstitutional," (Pet. App. A, at 18a), and that "a statute accommodating a religious group does not automatically create the impermissible effect of advancing religion." (*Id.* (citations omitted)). However, the New York Court of Appeals determined that Chapter 390 violates Establishment Clause neutrality principles. It also has the primary effect of advancing religion "for many of the same reasons [it] violates . . . neutrality principles." (Pet. App. A, at 12a-13a, 18a).

According to the New York Court of Appeals, Chapter 390 violates Establishment Clause neutrality principles because:

> a statute so narrowly drawn that it delegates a significant governmental power almost exclusively to a single religious group, . . . provides no assurance that the statute's benefits will be equally available to others . . . (*Id.; see also,* Pet. App. A, at 12a-13a).

As such, it is not a "truly religion neutral and generally applicable law" which allows the Village to obtain a public school district " 'merely as one in a series of many communities' eligible for equal treatment". (Pet. App. A, at 11a (citations omitted)).

In addition, this Court observed in its 1997 *Agostini v. Felton* decision that "the general principles . . . used to evaluate whether government violates the Establishment Clause" still require inquiry into the purpose and effect of governmental action, including "whether . . . [governmental action] has the 'effect' of advancing or

inhibiting religion." (521 U.S. 203, at 222-23). As indicated by the New York Court of Appeals:

> The class benefitted under Chapter 390 is anything but broad. Recognition of the fact that the statute benefits an extremely narrow class of municipalities is not a mere exercise in arithmetic or counting . . . The Supreme Court has held that the provision of benefits to a " 'broad * * * spectrum of groups is an important index of secular effect.' " (Pet. App. A, at 19a, citing *Kiryas Joel*, 512 U.S. at 703, *supra*; *Board of Educ. of the Westside Comm. Schools v. Mergens*, 496 U.S. 226, 252 (1990); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673 (1970); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988)).

Thus, contrary to the Petitioners' representations, the New York Court of Appeals did not subvert this Court's religious accommodation principles when it considered the scope of the statute's applicability in determining that Chapter 390 constitutes an impermissible accommodation of religion.

B. Neutrality and General Applicability of Statutory Criteria.

According to the Petitioners at pages 17-18 of the Petition for Writ of Certiorari, the New York Court of Appeals ruling subverts the decision of this Court's *Kiryas Joel* majority for essentially two reasons. First, because Chapter 390 sets forth "facially neutral, educationally related criteria" which were "ratified" by the New York Court of Appeals in its 1997 *Grumet v. Cuomo* decision. Second, because applicability of the statute's

criteria does not limit its application to a religious community and any group which is unable to satisfy the statute's "neutral, legitimate and nonexclusionary criteria" is not " 'similarly situated' " to the Village. Therefore, the statute does not single out the Village for "a forbidden religious preference."

However, as the *Kiryas Joel* majority decision exemplifies, the facial neutrality of a statute is not dispositive of its constitutional validity. (*See also, Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534 (1993); *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring)). Indeed,

> the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form. (515 U.S. 753, 777 (O'Connor, J., concurring)).

Moreover, notwithstanding the Petitioners' representations, the New York Court of Appeals below expressly disclaimed that its *Grumet v. Cuomo* decision suggested "the outline of Chapter 390," or that the removal of the two criteria it had questioned in that decision "would render the statute constitutional." (Pet. App. A, at 13a n.9). Instead, what the New York Court of Appeals suggested in *Grumet v. Cuomo* was that for the Legislature to obtain "a constitutionally acceptable result" it must enact "a truly religion-neutral law of general applicability" which the Village might invoke "as one in a broad array of eligible municipalities." (*Id.*). Indeed, it was precisely

because the statute failed to do the latter that the New York Court of Appeals invalidated Chapter 241 in *Grumet v. Cuomo*. (90 N.Y. 2d at 73).

Significantly, this "broad array" requirement is in total conformity with the *Kiryas Joel* majority decision, which was based on the fact that under the statute at issue therein the Village had not obtained its school district "simply as one of many communities eligible for equal treatment under a general law." (512 U.S. at 703). However, Chapter 390 fails to meet this standard. Instead, as set forth above, only two out of more than 1,500 municipalities in the State of New York qualify for the benefits of Chapter 390.

In addition, it is disingenuous for the Petitioners to represent that any municipality which does not meet the statute's criteria is just not "similarly situated" to the Village. In the first instance, as set forth above, it was not the intention to have other municipalities qualify under the statute. The qualifying criteria of Chapter 390 is identical to that of its predecessor, Chapter 241, except for the elimination of a previous limitation restricting the statute's applicability to preexisting municipalities, and a criteria relating to increases and decreases in a preexisting school district's actual valuation per total wealth pupil unit. Chapter 241's criteria, including those surviving under Chapter 390, were drafted so that the Village would be the only municipality able to take advantage of the statute "even though others technically could." (*Grumet v. Cuomo*, 225 A.D.2d at 9). The elimination of the valuation criteria allowed only one other municipality to become eligible for the benefits of Chapter 390.

Significantly, as the Record below establishes, the additional municipality meeting the qualifying criteria of Chapter 390 became eligible under the statute only because of the elimination of the criteria referred to in the previous paragraph. Accordingly, the eligibility requirements of Chapter 390 are as limited as those of Chapter 241 and allow the statute's benefits "to flow almost exclusively" to the Village. (Pet. App. A, at 12a-13a). Therefore, it is unlikely that others will meet the Petitioners' definition of "similarly situated."

Second, the phrase "similarly situated" as used by the *Kiryas Joel* majority referred expressly to communities seeking a school district of their own, e.g.,

> Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one . . . " (512 U.S. at 703).
>
> Nor can the historical context . . . furnish us with any reason to suppose that the Satmars are merely one in a series of communities receiving the benefit of special school district laws. (*Id.*, at 703-704).
>
> . . . we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges. (*Id.*, at 704 citations omitted).
>
> . . . whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored. (512 U.S. at 706).

> . . . we simply refuse to ignore that the method it chose is one that aids a particular religious community . . . rather than all groups similarly interested in separate schooling. (*Id.*, at 708).

C. ***Agostini v. Felton.***

The Petitioners' representations at pages 18-20 of the Petition for Writ of Certiorari that the New York Court of Appeals invalidation of Chapter 390 "rests on premises irreconcilable with this Court's more recent decision in *Agostini v. Felton*, 521 U.S. 203 (1997)" constitute a mischaracterization of the New York Court of Appeals decision below.

According to the Petitioners, the New York Court of Appeals ruled that Chapter 390 has the primary effect of advancing religion "simply because a community of religious believers benefits from the statute." However, as set forth above, the New York Court of Appeals did not determine that Chapter 390 has the primary effect of advancing religion "merely because believers are advantaged by it." Instead, it held that the statute has the primary effect of advancing religion "for many of the same reasons it violates Establishment Clause neutrality principles," (Pet. App. A, at 18a), and that the reason why it violates neutrality principles is because its qualifying criteria are so narrowly drawn as to provide no assurance of the equal availability of its benefits to others. (Pet. App. A, at 12a-13a). Fundamentally, the New York Court of Appeals deemed the statute to suffer from the same infirmity as the *Kiryas Joel* statute which did not confer its benefits on the Village " 'merely as one in a series of

many communities' eligible for equal treatment." (Pet. App. A, at 11a (citations omitted)).

In the Petitioners' view the New York Court of Appeals ruling is inconsistent with this Court's reluctance in *Agostini* "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." However, as the New York Court of Appeals noted below, the case herein is not the same type of Establishment Clause case as *Agostini*, which involved the provision of public aid to sectarian schools. (Pet. App. A, at 15a). Instead, as was also true in *Kiryas Joel*, the case involves the method by which a legislature may permissibly delegate governmental powers to a religious community. In accordance with the decision of the *Kiryas Joel* majority, this delegation can only be accomplished under a statute which affords its benefits to the religious community "as one of many . . . eligible for equal treatment." (512 U.S. at 703). Regarding the present case, two is not many by any standard.

The Petitioners further represent that the New York Court of Appeals decision is also inconsistent with this Court's statements in *Agostini* that "providing educational assistance to sectarian students is a legitimate purpose, as long as 'the aid is allocated on the basis of neutral secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.' " However, even if this were deemed to fall within the same category of Establishment Clause cases as *Agostini*, the Record below supports the New York Court of Appeals determination that the qualifying criteria of

Chapter 390 are not truly religion-neutral and generally applicable. As such, they are unlike those in *Agostini* which have broad application, and the New York Court of Appeals decision is not in conflict with the *Agostini* decision.

Finally, the Petitioners represent at page 19 of the Petition for Writ of Certiorari that the New York Court of Appeals decision "impos[es] a least restrictive alternative test in assessing the means the legislature chooses to accommodate burden on the exercise of religion" and

> restricts what would otherwise be permissible accommodation . . . [because it] held that since this Court decided *Agostini*, there were now other ways, short of the statute at issue, to solve the problems of educating the handicapped children of the Village of Kiryas Joel. In the majority's view Chapter 390 was not necessary and, therefore, 'would likely be perceived as a religious preference in light of the arguably constitutionally permissible alternative *Agostini* has provided.'

Put in actual context, however, and as more fully discussed above, the New York Court of Appeals determined that Chapter 390 violated Establishment Clause neutrality principles. For similar reasons it also had the effect of advancing religion. As such, it constitutes an impermissible accommodation of religion. (Pet. App. A, at 12a-13a, 18a-20a). The New York Court of Appeals then merely proceeded to add that the statute would also "likely be perceived as a religious preference" because of "its origin and operation", the Legislative Debates regarding the statute, and this Court's removal in *Agostini* of the barrier which had prevented Monroe-Woodbury

from providing services to the children of the Village in an exclusive Satmar setting. (Pet. App. A, at 20a-21a). Moreover, it was the opponents of Chapter 390 in the New York State Assembly who during Legislative Debates indicated that the statute "is legislation * * * that is not necessary. If given time and given the inclination to make the process work, students who are designed to be aided could be aided without this legislation." (Pet. App. A, at 21a).

II.

The Petitioners Have Not Properly Demonstrated That This Case Presents An Important Issue For This Court To Review

The issue in this case does not involve any broad questions of constitutional law such as whether a state may accommodate religion, or the conditions under which a religious community may acquire governmental powers. Indeed, a majority of this Court has already answered those questions, and the New York Court of Appeals acknowledged as much in its decision below.

Moreover, the only question which the New York Court of Appeals had to resolve was whether the particular method chosen by the New York State Legislature in this case to achieve such an end complies with the neutrality and general applicability requirements identified by this Court's majority in *Kiryas Joel*. Such a determination was made easier because the main parties in this case

are those also involved in the *Kiryas Joel* decision. Therefore, the issue concerned whether the New York Legislature appropriately heeded the admonition of the *Kiryas Joel* majority that a statute may confer governmental authority upon a religious community only if the community acquires such authority "as one of many . . . eligible for equal treatment." (512 U.S. at 703).

As set forth above, the statutory scheme chosen by the New York State Legislature in this case sets forth qualifying criteria which applies to only two out of over 1,500 municipalities in the State of New York. By any standard, two is not many.

The Record supporting the New York Court of Appeals decision establishes that the statute's criteria were drafted so that only the Village could take advantage of it. Indeed, the criteria were so tightly drawn that despite the revisions to its predecessor, Chapter 241, only one other municipality in addition to the Village qualifies under the statute. In this context, the *Kiryas Joel* majority indicated that in assessing the constitutional validity of a statute under the Establishment Clause it is appropriate to "insist 'up front' that a statute not tailor its benefits to apply only to one religious group." (*Id.*, at 708).

Thus, the case presents no important constitutional question for this Court to resolve.

Contrary to the Petitioners' representations at pages 21-22 of the Petition for Writ of Certiorari, the New York Court of Appeals decision is not in conflict with and does not require the reversal of either *Children's Healthcare Is a Legal Duty, Inc. v. DeParle*, Civ. No. 97-1979 (ADM/JGL) (D.Minn. July 24, 1998) or *Stark v. Independent School Dist.*

No. 640, 123 F.3d 1068 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1560 (1998). The court in *Children's Healthcare* was not confronted with a statute that bestowed governmental authority upon a religious community. Neither was it confronted with a prior ruling from a majority of this Court that governmental authority may be bestowed upon a religious community if the religious community obtains such benefit as one of many others eligible. With respect to *Stark*, the case did not involve a delegation of political power to a religious community. Neither was the *Stark* court confronted with a situation where the accommodation at issue singled out a particular sect. (123 F.3d 1068, 1075 (1996)). Rather, it was offered pursuant to a state law which:

> allows parents to review the content of instructional materials provided to a minor child. If the parent objects to that content, the district must make reasonable arrangements for alternative instruction. (*Id.*, at 1071).

Moreover, the record in *Stark* established that the school district did "not inquire into the motivations for a parent's objections; and that the district provides alternative instruction." (*Id.*, at 1072).

III.

Summary Reversal Is Not Appropriate

Petitioners urge this Court to summarily reverse the decision below on the basis that the New York Court of Appeals departed so far from the decision of the *Kiryas Joel* majority and *Agostini* as to warrant correction of the error. However, the decision of the New York Court of

Appeals is correct. Moreover, for all the reasons set forth above, it is in conformity with both the *Kiryas Joel* majority decision and *Agostini*. In addition, it is based on a carefully reasoned analysis of the highly factual issue as to whether Chapter 390 is a generally applicable religion-neutral law. Therefore, Respondents respectfully submit that the decision of the New York Court of Appeals is entitled to proper respect and plenary review, should this Court grant the Petition for Writ of Certiorari. (*See, Oregon State Penitentiary v. Hammer*, 434 U.S. 945, 947 (1997) (Stevens, J., dissenting); *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting); *Stone v. Graham*, 449 U.S. 39, 47 (1980) (Rehnquist, J., dissenting); *California v. Beheler*, 463 U.S. 1121, 1127 (1983) (Stevens, J., dissenting)).

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
July 2, 1999

Respectfully submitted,

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IN THE

Supreme Court of the United States

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONERS' REPLY BRIEF

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No. 98-1932

IN THE
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GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT, and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

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LOUIS GRUMET and CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITIONERS' REPLY BRIEF

INTRODUCTION

The respondents' brief in opposition to our petition for a writ of certiorari boils down to the proposition that under this Court's jurisprudence, a statute such as the one at issue here

is legitimate only if its benefits flow to "many communities," and, in the respondents' words, "two is not many."

The notion that this case turns on whether two is many reflects a fundamental misconception of both Establishment Clause jurisprudence and the workings of the New York statute at issue. The errors that are manifest in the respondents' attempt to defend the decision below only underscore the significance of the Establishment Clause issues presented by this case and the appropriateness of either plenary consideration or summary reversal by this Court.

ARGUMENT

1. The Issue Is Not Whether Two Is Many.—The respondents take as their mantra a single sentence from this Court's opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in which the Court, describing the original creation of the Kiryas Joel public school district, observed that "the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law." *Id.* at 703.

Respondents quote from this sentence no less than ten times in their brief in opposition (at pages 5, 8, 11, 14, 15, 18, 19, 20-21, 21, and 24). They contend that the sentence announces a constitutional rule that a statute such as the one at issue not only must employ religiously neutral, educationally legitimate criteria, but also must immediately provide benefits to "many" communities. Because at present there are only two communities that indisputably qualify to form school districts under the statute, and because (as respondents point out not once but twice) "two is not many" (Brief in Opp. at 21, 24), respondents argue that the majority of the court below correctly struck down the statute.

Respondents' reliance on this language is wholly misplaced. In the quoted language from this Court's *Kiryas*

Joel opinion, the Court was simply contrasting the Kiryas Joel legislation, which designated the Village of Kiryas Joel by name and applied to no other community, with a religiously neutral statute of general application that could apply to other communities as well. The Court did not say that a statute is constitutional only if "many" other communities currently qualify.

In any event, the statute currently at issue does apply equally to "many communities." Unlike the law struck down by this Court in *Kiryas Joel*, which did not even potentially apply to any community other than Kiryas Joel, the criteria of the new statute apply equally to every municipality in the State of New York that is situated wholly within a central or union free school district. Not all such municipalities are eligible to form school districts under the new statute, but all are treated equally in the sense that their entitlement to form a school district is determined by the same neutral and legitimate criteria.

Nor can it accurately be said that only two communities will *ever* be eligible to form their own school districts under the current statute. Unlike its immediate predecessor, which applied only to the closed set of municipalities already in existence at the time of its passage, the current law allows any municipality formed in the future to qualify. Respondents identify no inherent reason, nor even any significant practical obstacle, preventing other communities from engaging in the two-step process that Kiryas Joel went through: first forming their own municipalities pursuant to New York's Village Law, and then forming their own school districts under Chapter 390.

The respondents attempt to avoid this point by citing evidence that the statute was intended specifically to benefit the Village of Kiryas Joel. That the Legislature was motivated to pass the statute by a desire to accommodate the needs of this religious community, however, does not

invalidate the statute, since such a motivation is clearly permissible, as all the opinions produced by this Court in *Kiryas Joel* recognize.

The respondents contend that this permissible motivation is transformed into an illicit intent because the neutral and legitimate criteria of the statute at issue were deliberately crafted to benefit "*only*" Kiryas Joel (Brief in Opp. at 24). The respondents' position is directly contradicted by the record, which establishes: (1) that the statute even now does not benefit *only* Kiryas Joel;[1] (2) that there is nothing in the statute that would prevent an unlimited number of communities from receiving its benefits in the future; and (3) that Governor Pataki and the Legislature believed at the time the legislation was passed that it would immediately apply to ten communities—a belief that, even if factually erroneous, negates any inference that they crafted the law to apply only to Kiryas Joel.

Finally, the respondents claim that a statute, to be constitutional, must ensure that any group "seeking a school district of their own" (Brief in Opp. at 19) must be able to get one. But this cannot possibly be the meaning of this Court's use of the term "similarly situated" in *Kiryas Joel*. Such a conception of "similarly situated" is certainly inconsistent with Justice O'Connor's recognition in her concurrence that if the state does not wish to allow any community that wants a school district to have one, "it may set forth neutral criteria that a village must meet to have a school district of its own."

---

[1] Indeed, the brief in opposition contradicts itself on this point in consecutive sentences:

> The Record supporting the New York Court of Appeals['] decision establishes that the statute's criteria were drafted so that *only the Village* could take advantage of it. Indeed, the criteria were so tightly drawn that . . . *only one other municipality in addition to the Village* qualifies under the statute.

Brief in Opp. at 24 (emphasis added).

512 U.S. at 717. Justice Kennedy, too, flatly rejected the notion that a statute that does not draw lines on the basis of religion can be found unconstitutional just because it affords one religious group a benefit but does not grant it to another group that wants the same thing. 512 U.S. at 722.

2. Respondents' Position Fundamentally Misreads This Court's Establishment Clause Jurisprudence.— Respondents ultimately contend that a law setting forth entirely neutral, legitimate criteria violates the Establishment Clause if most of its benefits go to religious believers rather than being spread across a "broad spectrum." Respondents, in common with the majority below, fundamentally misconstrue the cases they cite for their "broad spectrum" analysis.

In each of the cases invoking the "broad spectrum" language, the statute at issue provided benefits on a neutral basis to both religious and nonreligious organizations or believers. In context, the "broad spectrum" language indicated the Court's conclusion that the statutes were neutral in effect because they did not single out religious institutions for special benefits not available to nonreligious groups—just as the New York law at issue here does not single out a religious group, but makes its benefits available to *any* municipality that satisfies its legitimate, neutral criteria. Nothing in any case cited by the respondents indicates that the "broad spectrum" analysis makes the constitutionality of a neutral statute depend on how many religious and nonreligious groups actually qualify for benefits. The respondents cite no case in which this Court has ever struck down a statute employing neutral, legitimate criteria simply because it disproportionately benefited religious believers. Indeed, one of the cases cited by the New York court on this point, *Wolman v. Walter*, 433 U.S. 229 (1977), upheld the provision of aid on a neutral basis to students in nonpublic schools *even though 96% of the benefits of the statute went to sectarian school students*. And, of course, the Court's most recent decision in this area,

Agostini v. Felton, 521 U.S. 203 (1997), makes clear that Establishment Clause analysis does not turn on a head-count of the religious believers among a statute's beneficiaries.

Respondents contend that *Agostini* and the other cases cited in our petition in which governmental actions have been sustained even though they primarily benefit religious believers are distinguishable because they involve aid to sectarian schools or other government benefits, and not statutes that "bestowed governmental authority upon a religious community." Brief in Opp. at 25. In so arguing, they overlook that the majority of this Court in *Kiryas Joel* did *not* accept the argument that the law there at issue should be condemned because it had the effect of conferring government authority on a religious community. *Compare* 512 U.S. at 696-702 (plurality opinion of Souter, J.), *with id.* at 716-17 (O'Connor, J., concurring), *id.* at 730 (Kennedy, J., concurring), *and id.* at 734-37 (Scalia, J., dissenting). And they nowhere explain why a statute providing for the creation of municipal public schools should somehow be subject to more stringent Establishment Clause analysis than statutes providing aid for private, sectarian instruction.

In the final analysis, the "broad spectrum" theory of the respondents and the court below is totally inconsistent with the recognition of all the Justices in *Kiryas Joel*—most particularly the two concurring Justices—that a legislative intent to accommodate a religious group is legitimate if effected through neutral legislation that does not draw lines on a religious basis. Of course, if the legislature's objective is to accommodate religious believers, it is hardly surprising that even facially neutral legislation directed toward that end will tend to benefit the group intended to be accommodated. If that is enough to condemn the legislation, this Court's approval of accommodation is nothing but hollow words.

The question this case ultimately poses is whether a statute that accommodates a religious community through the

use of neutral and legitimate criteria is to be struck down simply because it does not immediately benefit enough other groups. This Court's Establishment Clause jurisprudence—especially the various opinions in *Kiryas Joel* and the opinion in *Agostini*—clearly indicate that the answer to that question is no. Whether this Court's decisions are to be supplanted by a simplistic analysis focusing on "how many is many" is the significant issue in this case that justifies decision on the merits by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The decision of the New York Court of Appeals may be summarily reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GEORGE PATAKI, as Governor of the State of New York, THE NEW YORK STATE EDUCATION DEPARTMENT, RICHARD P. MILLS, as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS, H. CARL MCCALL, as the New York State Comptroller, THE BOARD OF EDUCATION OF THE KIRYAS JOEL UNION FREE SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT and DR. WILLIAM J. BASSETT, JR., as District Superintendent of the Orange-Ulster BOCES,

Petitioners,

v.

LOUIS GRUMET AND CAROLINE C. SHIPLEY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONERS' SUPPLEMENTAL BRIEF

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No. 98-1932

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of the Rules of this Court, the petitioners submit this Supplemental Brief to apprise the Court of the enactment of legislation relating to the matter in controversy in this case and to discuss the pertinence of that

legislation to the Court's consideration of our petition for a writ of certiorari.

On August 3, 1999, the New York Legislature enacted an omnibus budget bill which included an amendment to the portion of New York's Education Law that defines the powers of district superintendents. The legislation, which is reproduced in the Appendix to this brief, authorizes a district superintendent to order the partitioning of a school district that he or she supervises and divide it in accordance with procedures that parallel, in several respects, the procedures prescribed in the statute that is challenged in this case. Although the partitioning authorized by the new law might be sought by the Village of Kiryas Joel if the currently existing school district were abolished, there is no certainty that Kiryas Joel will be able to avail itself of the new statute, and the new law neither moots this case nor diminishes the significance of the issues presented by our petition for a writ of certiorari.

The newly enacted legislation adds § 2218 to New York's Education Law, leaving intact the existing provision (Education Law § 1504) under which Kiryas Joel's current school district was created. The new law expressly states in its opening section that the authority it grants to partition the territory of school districts is "in addition to the authority granted under the provisions of article thirty-one of this chapter" (the article that contains § 1504).

Under the new law, a school district may be partitioned to create a separate district for a municipality (defined as a city with a population of less than 125,000, or a village or a town) that is wholly contained within the existing district. The procedure requires approval by the municipality that desires to form its own district and by the existing district. The approval in each case must be either by majority vote in a special election or by a two-thirds vote of the governing body of the district or municipality. According to a statement

issued by Governor Pataki's office, the new law potentially applies to 29 New York municipalities that satisfy its population requirements and are wholly contained within larger school districts. *See* Joseph Berger, *4th Attempt to Aid Hasidic Village*, N.Y. TIMES, Aug. 5, 1999.

The new law contains detailed provisions concerning the preparation of reorganization plans for the new and existing districts, the rights of teachers and employees of the existing district, and the allocation of property, indebtedness, and state aid funds between the new and existing districts.

Although media accounts have described the legislation as intended to apply to Kiryas Joel, *see id.*, the new law would not be available to Kiryas Joel unless the judgment of the New York Court of Appeals in this case went into effect. The partition provision applies only to municipalities that are currently included in larger school districts. Kiryas Joel does not satisfy this definition and will not do so unless the judgment below becomes effective through denial of certiorari or affirmance by this Court.

The new legislation does not diminish the need for this Court to resolve this case, which continues to present issues of "importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Review should be granted to correct the New York court's distortion of Establishment Clause principles and its fundamental misreading of this Court's decision in *Kiryas Joel I*. New legislation can do nothing to correct the decision's pernicious precedential effects.

Nor does passage of the new law render the case moot. This is not a case where the underlying statute has been repealed or deprived of practical significance. *E.g.*, *Diffenderfer v. Central Baptist Church of Miami*, 404 U.S. 412 (1972); *Sanks v. Georgia*, 401 U.S. 144 (1971); *Hall v. Beals*, 396 U.S. 45 (1969).

A case is not moot if this Court can grant "any effectual relief whatever." *Calderon v. Moore*, 518 U.S. 149, 150 (1996). There is no doubt that a decision in this case would grant one side or the other "effectual relief"—either by definitively laying to rest the claim that the Kiryas Joel school district is unconstitutional or by invalidating the existing district and relegating the parties to their uncertain prospects under the new law. In similar cases, this Court has consistently held that a case is not mooted by new legislation where the new law will be effective only if the Court strikes down the old one, or where the Court's decision can resurrect the old law. *See, e.g., Hunt v. Cromartie*, 119 S. Ct. 1545, 1548 n.1 (1999); *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978).

The outcome of this case continues to have very real consequences for the parties. If this Court were to reverse the decision below, the existence of the Kiryas Joel school district would be finally secured without regard to the new law. If this Court were to affirm the decision of a majority of the New York Court of Appeals, the existing school district would be dissolved. The creation of a new Kiryas Joel school district would then depend on satisfaction of the requirements of the new statute, including action by the district superintendent and approval by the voters or governing bodies of both the Village and the Monroe-Woodbury School District. Even if these requirements were satisfied, a Kiryas Joel school district formed under the new law would be subject to legal challenge by the opponents of any school district for the Village.

Absent resolution of this case by this Court now, another round of litigation in the New York courts over the constitutionality of the new law (assuming Kiryas Joel were able to use it to form a new school district) is likely. If the decision below remains intact, it will bind the New York courts to the use of an erroneous legal standard in resolving any such litigation. Thus, one New York newspaper has

predicted that the New York courts will strike down the neutral legislation because it is intended to accommodate the needs of Kiryas Joel. *After the Budget, What?*, ALBANY TIMES UNION, Aug. 6, 1999, at A12.

The Court can forestall another round of fruitless and misguided litigation by ruling that the constitutionality of a neutral statute motivated by a desire to accommodate a religious community is not dependent on a nose-count of its religious and nonreligious beneficiaries.

CONCLUSION

For the foregoing reasons, as well as those set forth in our petition for a writ of certiorari and reply brief, the petition for a writ of certiorari should be granted. The decision of the New York Court of Appeals may be summarily reversed.

Respectfully submitted,

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APPENDIX

Section 83. The education law is amended by adding a new section 2218 to read as follows:

SECTION 2218. Partitioning of territory and formation of new school districts by district superintendents. Notwithstanding any other provision of law to the contrary, in addition to the authority granted under the provisions of article thirty-one of this chapter, a district superintendent of schools may order the partitioning of territory from an existing union free, central, central high school or enlarged city school district that is located within his or her supervisory district, the dissolution and reformation of the existing school district where necessary and the formation of a new union free or city school district out of such territory in accordance with the provisions of this section.

1. Definitions: For the purposes of this section and section thirty-six hundred two-f of this chapter:

a. "Actual valuation" means the actual valuation, as defined in paragraph c of subdivision one of section thirty-six hundred two of this chapter, of a school district that would result from reorganization pursuant to this section.

b. "Enlarged city school district" means a city school district of a city having a population of less than one hundred twenty-five thousand inhabitants that includes areas outside of the city boundaries.

c. "Enrollment" means the unduplicated count of all children registered to receive educational services in grades kindergarten through twelve, including children in ungraded programs as registered on the date prior to November first

that is specified by the commissioner as the enrollment reporting date for the school district or non-public school, as reported to the commissioner.

d. "Municipality" means a city having a population of less than one hundred twenty-five thousand inhabitants, a village or a town, wholly contained in one school district.

e. "New school district" means the school district formed or reformed from the territory partitioned from the pre-existing school district that is coterminous with a municipality.

f. "Pre-existing school district" means a union free, central, central high school or enlarged city school district from which territory is to be partitioned pursuant to this section.

g. "Remaining school district" means the school district remaining after its boundary is altered to partition a municipality.

h. "Union free school district" means any union free school district other than a special act school district as defined in subdivision eight of section four thousand one of this chapter.

2. Minimum qualifications. To be eligible for reorganization pursuant to this section, the municipality seeking to reorganize a new school district shall have a population of at least ten thousand inhabitants and the remaining school district shall have an enrollment of at least one thousand children, provided that any territory that was added to the pre-existing school district by vote for annexation, centralization or consolidation shall not be eligible for partitioning pursuant to this section until five

years after the vote approving such annexation, centralization or consolidation.

3. Procedure for reorganization.

a. Reorganization pursuant to this section may be initiated by a petition to the board of education of the pre-existing school district submitted by the governing body of the municipality seeking to reorganize a new school district. If the board of education determines that the petition has been properly submitted and that the territory described in the petition meets the minimum qualifications for reorganization under this section, it shall transmit a copy to the district superintendent with a request for assistance in the development of a plan for reorganization to form a new union free or city school district out of such territory.

b. The district superintendent shall assist the petitioners in developing such reorganization plan in consultation with representatives of the pre-existing school district. Such reorganization plan shall:

(i) describe the boundaries of the new school district;

(ii) state the effective date of the reorganization and indicate whether the new school district will be a union free school district or a city school district and, in the case of reorganization involving a central high school district or a city school district, the type of school district that the remaining school district will be;

(iii) describe how the facilities needs of the new school district will be met;

(iv) describe the impact of the reorganization upon

teachers and other employees of the pre-existing school district;

(v) describe the educational programs and services to be provided by the new school district, and for any reorganization that will take effect during a school year, describe how programs and services to students residing in the new school district will be continued without disruption for the balance of such school year;

(vi) set forth any real or personal property of the pre-existing school district that will be transferred to the new school district in accordance with this section;

(vii)provide for a proposed allocation of the bonded indebtedness of the pre-existing school district incurred while the territory to be partitioned was part of such pre-existing school district and for a proposed allocation of other debt of the pre-existing school district;

(viii) describe the impact of the reorganization on the contractual obligations of the pre-existing school district;

(ix) include a proposed budget for the new school district for the first school year of its operation and estimate the impact of the proposed reorganization on school taxes for taxpayers in the new school district and the remaining school district; and

(x) describe any necessary transition procedures for the first school year of operation of the new school district, including but not limited to procedures for the recommendation of special education programs and services for students with disabilities and preschool children with disabilities residing within the new school district.

c. The district superintendent shall review the proposed reorganization plan and determine whether it is in compliance with the requirements of this section. If the district superintendent certifies to the board of education of the pre-existing school district that such plan is in compliance, such board, within twenty days after receipt of such certification, shall proceed to call a special district meeting to conduct a vote on the proposed reorganization unless such reorganization is approved by a vote of the board of education to the extent provided under paragraph d of this subdivision and shall schedule at least one public hearing on the proposed reorganization, to be held not less than seven days prior to the vote. Notice of such special district meeting shall specify the date and time at which the vote will be held, which shall be not less than twenty nor more than thirty days after the publication or posting of such notice, and the place or places within the pre-existing school district at which the vote will be held. Such notice shall be published at least once a week for three consecutive weeks preceding the meeting in at least one newspaper in general circulation in the pre-existing school district, and if there be no such newspaper in general circulation in the district, such notice shall be posted in at least five conspicuous places in said district at least twenty days before such meeting.

d. The proposed reorganization shall be subject to approval by:

(i) a majority vote of the qualified voters residing in such municipality, or a vote of at least two-thirds of the governing body of such municipality, and

(ii) a majority vote of the qualified voters residing in the remaining school district, or a vote of at least two-thirds of the board of education of the pre-existing school district provided that a member who resides in such

municipality shall be ineligible to vote as a school board member on the proposition for reorganization.

e. Notwithstanding any other provision of law to the contrary, the board of education of the pre-existing school district shall be authorized to establish special election districts for the purpose of conducting the votes required under paragraph d of this subdivision, and the district superintendent shall be authorized to order any other modifications in school election procedures that are needed to carry out the provisions of this section.

4. Order of district superintendent. The clerk of the pre-existing school district shall file with the district superintendent a certification of the results of the votes required by paragraph d of subdivision three of this section. Upon filing of a certification that both required votes are in favor of reorganization, the district superintendent shall issue an order forming or reforming the new school district, altering the boundaries of the pre-existing school district accordingly, and, where necessary, reforming the remaining school district and shall file such order in the manner prescribed in section fifteen hundred six of this chapter. The new school district shall be formed as a union free school district authorized to provide instruction in grades kindergarten through twelve, except that if the new school district is coterminous with a city having a population of one hundred twenty-five thousand inhabitants or less, such order shall designate such district as a city school district. Notwithstanding the foregoing, where the territory partitioned from a central high school district is coterminous with a former component school district of such central high school district, the district superintendent's order shall reform the component school district as a union free school district authorized to provide instruction in grades kindergarten through twelve. The remaining school district shall retain its

status as a Union free, central, central high school or city school district, except that (i) where the new school district is a city school district, the remaining school district shall be reformed as a union free school district, and (ii) where such reorganization would result in a central high school district with only one component district, the district superintendent shall order reformation of the remaining central high school district into a union free school district.

5. Effect of partitioning of territory.

a. If there is outstanding bonded indebtedness chargeable against the pre-existing school district at the time of reorganization incurred while the territory to be partitioned was part of such pre-existing school district, the district superintendent shall apportion such indebtedness between the new school district and the remaining school district according to the actual valuation of the two districts, based on data on file with the commissioner; and any approved expenditures for debt service represented by such apportioned indebtedness shall be eligible for an apportionment of building aid computed pursuant to subdivision six of section thirty-six hundred two of this chapter using an aid ratio computed for use in any year commencing with the nineteen hundred eighty-one -- eighty-two school year for the pre-existing school district. The portion of such bonded indebtedness so apportioned shall become a charge upon the respective districts as though the same had been incurred by said districts separately, and the amount so apportioned shall not be adjusted thereafter.

b. Where the pre-existing school district has incurred indebtedness other than bonds or notes for the benefit of the residents of the municipality such other debt may be apportioned by the district superintendent between the new school district and the remaining school district in the

manner and to the extent provided in the reorganization plan.

c. Upon the effective date of the reorganization, legal title and all other property rights to any school facility of the pre-existing school district that is located within the new school district shall be transferred to such new school district, except that school facilities of a central high school district shall remain the property of the central high school district. The district superintendent shall apportion the value of any school facility so transferred between the new school district and the remaining school district accord to the actual valuation of the two districts based on data on file with the commissioner. In determining such value, the district superintendent shall deduct from the fair market value of the school facility the amount of any outstanding bonded indebtedness on such facility. The cost of an appraisal to determine fair market value shall be a charge upon the new school district. The board of education of the new school district shall reimburse the board of education of the remaining school district in an amount equal to the remaining school district's share of the value of the school facility as apportioned by the district superintendent, and such amount shall be a charge upon the new school district.

d. Any school bus or personal property of the pre-existing school district that is no longer needed by the remaining school district may be transferred to the new school district upon such terms and conditions as may be agreed upon by the boards of education of the remaining school district and the new school district.

e. For any reorganization pursuant to this section that takes effect during a school year, the district superintendent shall apportion the administrative expense of the board of cooperative educational services chargeable to the pre-existing school district between the new school district and

the remaining district based on the actual valuation of the two districts.

f. Members of the teaching and supervisory staff of the pre-existing school district at the time of the reorganization shall have the right to select the school district in which he or she shall be considered an employee, with the same tenure status he or she maintained in the pre-existing school district. Such selection shall be based on each teacher's seniority in the pre-existing school district, with the right of selection passing from such teachers with the most seniority to such teachers with the least seniority. Any such teacher who is unable to obtain a teaching position in the new school district because the number of positions needed is less than the number of teachers eligible to be considered employees pursuant to this paragraph shall, in such new school district and in the remaining school district, be placed on a preferred eligible list of candidates for appointment to a vacancy that may thereafter occur in a position similar to the one such teacher filled in the pre-existing school district. Such teachers shall be appointed to vacancies in such corresponding or similar positions in the order of their length of service in the pre-existing school district, within seven years from the date of the reorganization pursuant to this section. For such teachers, for salary, sick leave or any other purpose, the length of service credited in the pre-existing school district shall be credited as employment time with the new school district or the remaining school district, as applicable.

g. Members of the board of education of the pre-existing school district who reside in the territory partitioned pursuant to this section shall vacate their positions on the effective date of the reorganization, and the vacancies so created shall be filled in the manner provided by law, provided, however, that if the board of education of the

remaining school district is unable to obtain a quorum to vote on whether to fill such vacancies by appointment or to call a special district meeting to fill the vacancies by election within thirty days after the reorganization, the district superintendent shall be authorized to fill such vacancies until the next annual meeting and election of the district. Whenever a school district is reformed pursuant to this section, the reformed school district shall be the successor in interest of the former school district and the board of education of the former school district shall continue as the board of education of the reformed school district, except that where a central high school district is reformed as a union free school district the board of education of the component school district that is coterminous with the central high school district shall become the board of education of the reformed school district, and the members of the board of education of the central high school district shall vacate their positions on the effective date of the reorganization.

h. Notwithstanding any other provision of law to the contrary, if a proposal for reorganization pursuant to this section is defeated by the voters, such proposal may not be resubmitted for a vote until two years after the original vote.

Section 83-a. The education law is amended by adding a new section 3602-f to read as follows:

Section 3602-f. Apportionment of moneys to school districts that result from the partitioning of territory and formation of new school districts by district superintendents. Notwithstanding any other provision of law to the contrary, the apportionment of public money payable to school districts resulting from the partitioning of territory and formation of new school districts pursuant to section twenty-two hundred eighteen of this chapter shall be computed

pursuant to section thirty-six hundred two of this article as adjusted by this section.

1. Definitions. As used in this section the following terms shall be defined as follows:

a. "Combined data" shall mean any data or reports of factors specified in statute or regulation for the calculation and payment of any apportionment of state aid during the current school year pursuant to this chapter that derive from the annual records of the pre-existing school district, the remaining school district or the new school district for any school year ending prior to the first complete school year commencing on or after partitioning of territory of the pre-existing school district and formation of the new and remaining school districts pursuant to section twenty-two hundred eighteen of this chapter.

b. "Partitioned data" shall mean:

(i) for the new school district, the product of combined data multiplied by the quotient of the resident public school district enrollment during the current year of such new school district divided by the sum of the resident public school district enrollment during the current year of the new school district and of the remaining school district, and

(ii) for the remaining school district the product of combined data multiplied by the quotient of the resident public school district enrollment during the current year of such remaining school district divided by the sum of the resident public school district enrollment during the current year of the new school district and of the remaining school district.

c. "Adjusted actual valuation" shall mean the product of the actual valuation of the pre-existing school district, as defined in paragraph c of subdivision one of section thirty-six hundred two of this article, that would have been used to compute aids apportioned to the pre-existing school district in the current school year if partitioning had not occurred, and the actual valuation adjustment factor.

d. "Actual valuation adjustment factor" shall mean

(i) the quotient of the total taxable value of the assessment roll used by the school district claiming an apportionment pursuant to this section to levy taxes in the first complete school year commencing on or after partitioning divided by the applicable equalization rate used to apportion such tax levy, divided by

(ii) the sum of such quotients computed for the new school district and for the remaining school district. Such factor shall be computed by the director of the office of real property services based on reports to be submitted to the director of real property services by the new school district and by the remaining school district, in a format specified by the director, no later than thirty days after the levy of taxes for the first complete school year commencing on or after partitioning. The director of the office of real property services shall certify the value computed for the new school district and for the remaining school district to the commissioner no later than thirty days after the receipt of such reports.

e. "Adjusted income" shall mean the product of the adjusted gross income of the pre-existing school district as set forth in paragraph k of subdivision one of section thirty-six hundred two of this article, that would have been used to compute aids apportioned to the pre-existing school district

in the current school year if partitioning had not occurred, and the actual valuation adjustment factor.

2. Notwithstanding any other provision of this chapter, for the purposes of computing any apportionment of state aid payable pursuant to this chapter to the new school district or to the remaining school district during the first complete school year commencing on or after partitioning or any school year thereafter, the following factors used in the apportionment and payment of aid to the new school district or to the remaining school district shall be used in lieu of the indicated factors for any calculations that are based pursuant to statute on such data for a school year ending prior to such first complete school year commencing on or after partitioning, except that where the commissioner determines that more accurate data is available for actual valuation and/or income, the commissioner shall use such more accurate data:

a. Adjusted actual valuation as defined in paragraph c of subdivision one of this section in lieu of actual valuation as defined in paragraph c of subdivision one of section thirty-six hundred two of this article.

b. Adjusted income as defined in paragraph e of subdivision one of this section in lieu of adjusted gross income as set forth in paragraph k of subdivision one of section thirty-six hundred two of this article.

3. Notwithstanding any other provision of this chapter, for the purposes of computing any apportionment of state aid payable pursuant to this chapter to the new school district or to the remaining school district during the first complete school year commencing on or after partitioning or any school year thereafter, the following factors used in the apportionment and payment of aid to the new school district

or to the remaining school district shall be computed using combined data for any calculations that are based pursuant to statute on such data for a school year ending prior to such first complete school year commencing on or after partitioning.

a. Percentage of pupils with special educational needs as defined in subparagraph one of paragraph e of subdivision one of section thirty-six hundred two of this article.

b. Expense per pupil as defined in paragraph f of subdivision one of section thirty-six hundred two of this article.

c. Attendance ratio as defined in paragraph m of subdivision one of section thirty-six hundred two of this article.

d. Percent of eligible applicants for the free and reduced price lunch program as defined in paragraph p of subdivision one of section thirty-six hundred two of this article.

e. Sparsity factor as set forth in subparagraph (ii) of paragraph r of subdivision one of section thirty-six hundred two of this article.

f. Percentage of pupils with compensatory educational needs as defined in paragraph t of subdivision one of section thirty-six hundred two of this article.

g. Tax effort ratio as defined in subparagraph one of paragraph a of subdivision sixteen of section thirty-six hundred two of this article.

h. Residential real property tax levy as defined in

subparagraph three of paragraph a of subdivision sixteen of section thirty-six hundred two of this article.

i. School district basic contribution as defined in subdivision eight of section forty-four hundred one of this chapter.

4. Notwithstanding any other provision of this chapter, for the purposes of computing any apportionment of state aid payable pursuant to this chapter to the new school district or to the remaining school district during the first complete school year commencing on or after partitioning or any school year thereafter, the following factors used in the apportionment of aid to the new school district or to the remaining school district shall be computed using partitioned data for any calculations that are based pursuant to statute on such data for a school year ending prior to such first complete school year commencing on or after partitioning:

a. Summer session pupils as defined in paragraph g of subdivision one of section thirty-six hundred two of this article.

b. Comprehensive operating aids base as defined in paragraph j of subdivision one of section thirty-six hundred two of this article.

c. Enrollment, public school district enrollment, nonpublic school enrollment, resident public school district enrollment, resident nonpublic school district enrollment and additional public school enrollment each as defined in paragraph n of subdivision one of section thirty-six hundred two of this article.

d. Limited English proficient pupil count as defined in paragraph o of subdivision one of section thirty-six hundred

two of this article.

e. Public excess cost aid base as defined in paragraph y of subdivision one of section thirty-six hundred two of this article.

f. Extraordinary needs aid base as defined in paragraph z of subdivision one of section thirty-six hundred two of this article.

g. Resident weighted average daily attendance as defined in subdivision two of section thirty-six hundred two of this article.

h. Adjusted average daily attendance as defined in subdivision two-a of section thirty-six hundred two of this article.

i. Total wealth pupil units as defined in subdivision two b of section thirty-six hundred two of this article.

j. Approved transportation expense as defined in subdivision seven of section thirty-six hundred two of this article.

k. Total aidable pupil units as defined in subdivision eight of section thirty-six hundred two of this article.

l. Weighted pupils with handicapping conditions as defined in subparagraph b of paragraph one of subdivision nineteen of section thirty-six hundred two of this article.

m. Number of declassified pupils as defined in paragraph seven of subdivision nineteen of section thirty-six hundred two of this article.

n. Approved expenses for instructional computer hardware and technology equipment as defined in subdivision twenty-six of section thirty-six hundred two of this article.

o. Approved expenses for instructional computer technology as defined in subdivision twenty-six-a of section thirty-six hundred two of this article.

5. In the event the effective date of a reorganization pursuant to section twenty-two hundred eighteen of this chapter is after July first in any school year, or for any other grant or apportionment of aid not referenced in this section, aid shall be computed in the manner prescribed in the regulations of the commissioner.

6. Notwithstanding any provision of section three hundred fourteen of this chapter or paragraph a of subdivision fourteen of section thirty-six hundred two of this article to the contrary, a school district that has been reorganized pursuant to section twenty-two hundred eighteen of this chapter shall be eligible for apportionments of building aid pursuant to subdivision six of such section thirty-six hundred two of this article and this section for the construction, acquisition, reconstruction, rehabilitation or improvement of school buildings after a reorganization pursuant to section twenty-two hundred eighteen of this chapter despite any inconsistency between such reorganization and the state plan for school reorganization. In addition, following the partitioning of territory pursuant to section twenty-two hundred eighteen of this chapter, the remaining school district shall continue to be eligible to receive reorganization incentive aid and/or reorganization incentive building aid for a prior reorganization in accordance with subdivision fourteen of section thirty-six hundred two of this article, except where such partitioning reverses the prior

reorganization for which such aid would be paid.